HOUSING TASK FORCE: HOMEOWNER LOGBOOKS UNDER DISCUSSION

TESCO LAW: CORE VALUES NOT FOR SALE

LEGAL EDUCATION: MERITS OF TRADITIONAL METHODS
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*journal@connectcommunications.co.uk*
David Preston suggests that it’s possible fewer complaints about the service offered by solicitors would arrive at the Ombudsman if the profession was less “lawyerly” in the way it handles them.

Unfortunately, due to the 1500 (approx) sheets of paper for the June Council meeting, I failed to fulfil the plans and arrive in Tobermory in time to take part in the 2nd leg of the Round Mull race, although I did make it to Bunessan by ferry and bus on the Saturday, which allowed me to join the festivities and to sail back – in appalling weather on the Sunday to Oban. I was the lucky one as the wind was coming from behind us on Sunday, as opposed to Saturday when it was coming out of Bunnessan (see June Column) – making it more of a slog.

Which leads me on to the Ombudsman’s report, which was published on 9th July and which mainly criticised the delays involved in the complaints investigation process. The Society is aware of these concerns and is working to reduce the time taken to deal with complaints.

Too many complaints do not really merit the huge amount of resource that is spent, either because the complainer is seeking a totally unrealistic outcome about which the Society can do nothing, or the firm could have addressed a potential problem at an earlier stage and avoided the process starting altogether. If we have the chance, we should try to run with the wind and reduce the effort needed to deal with complaints.

It might be that we are being too ‘lawyerly’ about some complaints, particularly in service matters. I heard of a member of another profession who encourages his clients to complain and let him know of anything they don’t like about his service (which he sees as perfect – as we all do). He believes that if his clients deal with the minor gripes such as calls not being returned as quickly as the client wants etc, they will not build into a huge complicated complaint which takes up his, the client’s, the investigator’s, a reporter’s, a committee’s, the council’s and possibly the ombudsman’s time.

But let us not forget that in spite of the criticisms from the Ombudsman, the public protection afforded by the legal profession in Scotland is unique. As I write, a former clerk in a firm of accountants is settling into unfamiliar surroundings, having spent a reported £200,000 of other people’s money. How much of that has been or will be returned to its rightful owners?

I would, however, sound a cautionary note in view of the report in The Times of 23 July about an English solicitor being jailed for six months for not reporting a suspicion of money-laundering. Believe me, the authorities want to crack down on money-laundering and they are likely to be merciless with solicitors who don’t comply with the regulations. More details of this case can be found elsewhere in this issue.

The other Annual Report issued last month was from SLAB. The media, as ever, focused on who was taking what from the fund, but behind that, I think the report demonstrates further the increased level of cooperation between the Society and the Board, which I hope will continue to extend to the relationship between the profession and the Board.

I am grateful to Colin Campbell for his articles in the last two issues of the Journal and I would echo his recognition of the good relations between the Society and the Faculty and the need to recognise that, although we represent separate branches, we are one profession. The independence of which he speaks is one of the core values of the profession, which we disregard at our peril. The independence of which he speaks is one of the core values of the profession, which we disregard at our peril.

Independence is one of the core values of the profession, which we disregard at our peril.

...
The jailing of solicitor Jonathan Duff at Manchester Crown Court is ominous for all in the profession and acts as a stark warning that the price of unintentional money laundering could scarcely be higher.

Duff failed to report his suspicion in relation to money paid to his firm by a commercial client who was subsequently convicted of drug trafficking.

The circumstances of the case, as reported in The Times on July 23 are as follows.

In the mid 1990s, Duff was paid £70,000 by an established client on account of fees. A short time later the client asked for his money back and Duff obliged, after deducting his fees. The following year the client was arrested and prosecuted for drug trafficking. The client pleaded ignorance and instructed Duff to defend him. After accessing prosecution evidence, Duff ascertained that the client spent the £70,000 on his ostensible business.

As a precaution, Duff consulted the Drug Trafficking Act. As section 52 refers only to suspicion of a person who is engaged in drug money laundering, Duff decided he had no such suspicion, concluding that at most it related to a past completed transaction.

While accepting Duff had misunderstood his professional duty under S52, the judge sent Duff to prison and spoke of the need to send out a clear message to solicitors.

The implications of the case are potentially vast, creating a predicament for any firm acting for a private client accused of having obtained money unlawfully.

Leslie Cumming, Chief Accountant of The Law Society of Scotland, said: “The risk to solicitors are the same in Scotland as they are in England. Recent developments in Europe and the enactment of the Proceeds of Crime Act on the 24th of July point to the need for greater vigilance in dealing with clients’ financial business.”

The Law Society of Scotland has welcomed last month’s publication of the Scottish Legal Aid Board’s annual report. David Preston, President of the Society, said: “The Society recognises the improvements which the Legal Aid Board continues to make to the delivery of legal aid, enabling people who could not otherwise afford it to have access to quality legal advice. The last twelve months have seen a number of welcome developments, such as the extended periods allowed to pay legal aid contributions. Through our joint work within the tripartite group, involving the Justice Department, the Board and the Society we are aware of a number of equally welcome developments likely to emerge over the next twelve months. The willingness of the current Board and their senior officials to take these initiatives in improving access to justice reflects greatly to their credit, as does the willing response of the Executive.”

“As always the statistical information in the Report, while informative in itself, also indicates trends which may give rise to some concern, particularly the continuing reduction in Civil Legal Aid Applications, which we regret is not simply indicative of declining legal need. At first glance the increase of £5million in criminal legal aid expenditure might also require further analysis, although we suspect that it merely reflects the priority which the Executive is placing on tackling crime. The Society remains committed to working with the Board to ensure that people in Scotland continue to have access to proper legal advice in both criminal and civil cases. We are working with the Board on proposed changes to civil legal aid, including the introduction of a new quality assurance scheme and feeing structure which we intend submitting to the Scottish Executive imminently.” Jean Couper, Chairman of the Scottish Legal Aid Board, said: “Changes to special urgency provisions and contribution payments, together with the uprating of some elements of the financial eligibility tests, are well targeted and will make a real difference to many. For the first time the Board is now working in partnership with the not for profit sector and local government. “Much has been achieved but there is much more to be done. Our objectives for the coming year are demanding and wide-ranging. The Board faces many new challenges. We have introduced higher targets for our performance and will work with others to seek further developments in the delivery of legal aid.”
Exemption from payment of court dues

Practitioners are asked to note the following correspondence between Bruce Ritchie, Director of Professional Practice at the Society, and the Chief Executive of the Scottish Courts Service

Dear Sir

We were pleased to see that, partly as a result of representations by the Society, exemption has now been granted to persons on means tested benefits or on Legal Aid. We note the wording of the Fees Orders which state “a fee to which this article applies shall not be payable by a person” who is in receipt of the stated benefits.

I regret to say however that we are very concerned about the manner in which the exemption is to be claimed. The Fees Orders are silent on the procedure to be followed, but we understand that a policy decision has been taken to require a Fee Exemption Certificate to be signed by the client in respect of each and every fee.

In our view this will create a wholly unnecessary administrative burden for the Scottish Courts Service and for the profession, particularly in Legal Aid cases. Unlike the benefits which are listed in the Fees Orders, Legal Aid is only available through a solicitor and the solicitor will know at all times whether Legal Aid has been granted, remains in force, or has been withdrawn.

We therefore think it is essential that immediate steps are taken to simplify the means by which exemption is claimed in Legal Aid cases. Only one application for exemption should be necessary and exemption should be granted automatically thereafter until the Court is notified by the solicitor that Legal Aid is no longer available to the client. There should be a separate application form in Legal Aid cases from cases where the applicant is in receipt of some other benefit.

There is a further difficulty with the existing form, which contains no space for the Court’s reference number. Our members advise us that forms have been rejected by the Court for lack of a reference number. It is unfortunate that there appears to have been no consultation on the layout of this form before it was issued. In addition the wording refers to a fee payable “in connection with my application”. What is meant by “application”? Many fees are levied – particularly in the Court of Session – for steps in process where no application is being made – e.g. at the lodging of a record. This wording may be relevant for Small claims or Summary Causes but should be amended in respect of the Court of Session and Ordinary Actions in the Sheriff Court.

Our Judicial Procedure Committee urge the Scottish Courts Service to take immediate steps to rectify this unsatisfactory situation.

I await hearing from you as a matter of urgency.

Robert N. Gordon
Operations and Policy Unit

Dear Sir

I note what you say in your letter in relation to the Society’s concerns particularly on frequency of submission of the application and also in relation to signatories. Due to the rapid implementation of the provisions it was unfortunately not possible to engage in a consultation type exercise. However as a result of various comments being submitted both from the courts and practitioners and in an attempt to address concerns we have taken the opportunity to revisit the issue.

After further discussions with the SCS Fees Working Party it has been agreed to alter the procedure and paperwork involved in the Sheriff Court and the Court of Session as follows:

a An application form, revised in the interests of clarity, and containing full details of the claim for exemption will be required at the outset of the case or entitlement (Copy application enclosed)

b For subsequent events in the proceedings an abbreviated docquet confirming entitlement should be submitted. I have enclosed a copy of the docquet for your information and you will see that the information to be entered will render its completion no more burdensome to practitioners than the existing cheque and E200 system. This will also facilitate necessary checks into changes in circumstances.

c The point on whether the applicant should, or indeed would be available to, sign at each stage is well made, and in this regard it has been agreed that the applicant or solicitor may sign the application or docquet.

As previously mentioned it has not been possible to enter into formal consultation but I hope you agree that the above alterations go some way to addressing your concerns and minimising the burden on practitioners, whilst at the same time complementing existing court accounting procedures.

The new forms should be readily available from courts and will be available from the SCS Website in the near future.

Hopefully once these changes are in place and become familiar to all, the process should operate more effectively and to all parties’ advantage.

Robert N. Gordon
Operations and Policy Unit
Financial sector firms lagging behind in use of intellectual property

A survey of over 300 European companies on behalf of KPMG has found that intellectual property is still undervalued as an issue and as an asset by business - and especially amongst financial sector firms. A third of European financial sector firms have no inventory of their intellectual property, while nearly two thirds have never considered exploiting their intellectual assets to boost their income.

Nearly a third (31%) of financial sector firms said that there is lead responsibility for IP at Board level which, while still low, is slightly better than the cross-industry average of 28. However, financial firms are the least active legally in protecting their IP - 63% said they had taken legal action in the last 3 years to resolve a dispute (compared to 75% of consumer and retail companies).

Shonaig Macpherson, Senior Partner of McGrigor Donald, a member of KLegallnternational, the network of law firms associated with KPMG, said: “Many banks simply assume they have ownership when they don’t. This means that they can’t exploit the systems themselves or even stop the supplier selling them to a competing organisation. This was particularly true of the rush into e-banking - the sudden scaling back of all this expenditure meant pulling out of agreements with third parties without the issue of ownership having been settled. In their urgency to ‘e’ everything, some banks simply forgot to cover all the bases.

Trainee assignments discouraged

It was recently brought to the attention of the Admissions Committee that adverts for second year trainees had appeared in the Journal’s Situations Vacant columns. The Admissions Committee would like to remind members that trainees commit to a two year training contract and that it is only in exceptional circumstances that assignments are permitted. It is the Society’s policy to discourage firms from actively seeking second year trainees.

Certificate in Mortgage Advice & Practice - Bridge Paper

The Mortgage Code Compliance Board (MCCB) have agreed that holders of the Investment Advice Certificate are now eligible for entry to the bridge paper of the Certificate in Mortgage Advice & Practice. This extends the number of qualifications which are now accepted for entry to the bridge paper. Holders of the Investment Advice Certificate, in order to gain the Certificate in Mortgage Advice & Practice must complete a three-hour examination consisting of 40 multiple choice questions and 3 written case-study questions. The syllabus is drawn from Paper 2 and Paper 3 of the Certificate in Mortgage Advice & Practice.

Financial Services Authority - Risk based approach to investment regulation

All firms which are authorised by the Financial Services Authority (FSA) are given a risk assessment. The FSA does not notify firms of the risk category into which a firm is assigned. There are four categories ranging from Category A, which is the highest risk assessment, to Category D which is the lowest risk assessment. However, the FSA has advised the Society that a firm will know by default if it falls into the lowest risk category D. This is because a firm which falls into risk category D will not have a named supervisory contact at the FSA but, instead, the FSA contact will be through the FSA’s contact/call centre.

Financial Services Authority (FSA) - Hard copy versions of FSA manuals

The Society has a complete set of hard copy versions of the FSA’s manuals. A firm which is authorised by the FSA and which wishes to have access to the Society’s hard copy manuals should contact David Cullen at the Society by e-mail on davidcullen@lawscot.org.uk.

Scottish Solicitors’ Discipline Tribunal

Julian Struthers Daskin

Two Complaints were made by the Council of the Law Society of Scotland against Julian Struthers Daskin, Solicitor; Braemar; Leven, Fife (“the Respondent”). The Tribunal found the Respondent guilty of professional misconduct in respect of his committing acts of shameless indecency and using lewd, licentious and indecent practices against males in circumstances where he was in a position of trust and in respect that he acted for both parties in a conveyancing transaction where the interests of the parties conflicted and where he had a personal interest in the outcome of that transaction and failed to send the necessary written advice to both parties.

The Tribunal ordered that the name of the Respondent be struck off the Roll of Solicitors in Scotland.

The Tribunal considered the Respondent’s conduct disgraceful, dishonourable and wholly unbecoming a solicitor and considered that the Respondent was no longer a suitable person to remain a solicitor.

Classic Letter of Obligation

I refer to the above and advise that the period of 14 days in the Classic Letter of Obligation has been under discussion with the Master Policy insurers and it has now been agreed that this period will be extended to 21 days. This has not yet come into effect and there will be a longer article about this matter in the September edition of The Journal.

For the avoidance of doubt practitioners should be advised that as and when the change comes into effect (which will probably be in November) it will still be necessary to try to ensure that the Disposition is sent for recording/registration without delay. The extension of the time limit is simply to cover delays, which may be occurring at the Stamp Office, and to help practitioners during periods when there are extensive public holidays.

Linsey J Lewin
Secretary Conveyancing Committee
Criminal Legal Aid Duty plans 2003

THE Scottish Legal Aid Board is preparing duty plans for the sheriff and district courts from 1 January 2003 to 31 December 2003. Letters have been sent to solicitors in each court area asking if they wish to be included in the plans.

There are a number of eligibility criteria for inclusion on duty plans. Last year, new eligibility criteria for inclusion on the duty plans was introduced following a wide consultation exercise. The revised criteria, which will be used again this year, were based on the Duty Solicitor Guidelines, which have been in place for a number of years now. Solicitors should also note the provisions of Regulation 5 of the Criminal Legal Aid (Scotland) Regulations 1986.

The application forms, letter and Duty Solicitor Guidelines are available on the Board’s web-site for the legal profession at www.slabpro.org.uk

You should note the following deadlines:
- 30 August 2002 – last date for applications to be included in the plans
- 25 October 2002 – last date for the Board sending out draft copies of the plans
- 15 November 2002 – last date for representations against any plan

If you have not received a copy of the plan by 25 October 2002, it will mean that an application was not received from you to go on the plan. The Scottish Legal Aid Board will not regard as adequate reasons for amending a plan the fact that a person has failed to reply to the circular letter, however compelling the circumstances, or has become eligible to undertake criminal cases after the plan has been finalised.

For further information contact Lynsey Stoddart or Carol Moffat, SLAB, 44 Drumosaic Gardens, Edinburgh EH3 7SW, tel 0131 226 7061.

Edinburgh Festival 2002 – High Street traffic restrictions

The City of Edinburgh Council have advised that from Saturday 3rd until Monday 26th August the High Street will be closed to ALL traffic between the hours of 10am and 9pm. The only exceptions to this will be essential vehicles of which the Council has previously been made aware.

Anyone attending Parliament House (or the WS or Signet Libraries), including Court Runners who use taxis to deliver papers to court, will require to be dropped off either at the corner of The Mound or St Giles Street and to walk to Parliament House from there. Those bringing bulky papers can request the use of trollies, provided by the Council and available from the Rock Steady stewards, to deliver these to Court (the trollies will have covers in case of rain and ‘cobbled-friendly’ wheels). There is a Drop-Off (only) point at St Giles Street, from where vehicles parked for any amount of time will be removed.

Any vehicle parked in the High Street, Parliament Square West or the Mercat Cross after 10.30am will be removed.

Edinburgh University Class Reunion

Alison Grant is trying to organise a class reunion for law students who commenced their degree course at Edinburgh University in 1978. Bryan Anderson is helping round up classmates who now work in London. They propose to hold a Dinner in Edinburgh on the evening of Saturday 26 October 2002 - the venue is still to be confirmed.

If you, or anyone you know, are interested in attending please e-mail Alison at agrant@biggartbaillie.co.uk

Thinking of becoming a Civil Solicitor Advocate?

The Society of Solicitor Advocates has also teamed up with Nottingham Law School’s NITA Training Organisation and intends to offer a residential one week long “Advanced Civil Advocacy” course later in the year. This course will be heavily weighted towards appearance work and delegates will be videoed “on their feet”. For more details on any of the above contact Paul Motion on 0131 200 1057 or Alayne Swanson on 0141 248 5011.
Alzheimer Scotland – Action on Dementia are delighted to be selected as Charity of the Year by the staff of the Law Society of Scotland. The Society will arrange a number of in-house events including coffee mornings and dress down days and Alzheimer Scotland are offering the opportunity to join some of their other supporters in events they organise. Events include an aerial Zip Slide over the Clyde, team White Water Rafting, the Edinburgh to Dunbar Bike ride, the Glasgow Half marathon, the Capital City Challenge 10km run, the West Highland Way and St Cuthbert’s Way walks, a trek in lovely Madeira in November, Firewalking on Guy Fawkes night, the London and Edinburgh Marathons and the National Tea Day that happens every 21 September to celebrate World Alzheimer’s Day. The latter is Alzheimer Scotland’s biggest fundraiser and this year they hope to have 500 tea parties happening in businesses and community groups all over Scotland. If you would like further information about this or any other events please visit www.alzscot.org/fundraising or e-mail DLaing@alzscot.org or call Dianne Laing on 0131 243 1453.

The Commercial Debts Directive

The Commercial Debts Directive has been transposed into Scottish law through 3 Scottish Statutory Instruments:
- The Late Payment of Commercial Debts (Scotland) Regulations 2002 (SSI 2002/335)
- The Late Payment of Commercial Debts (Rate of Interest) (Scotland) Order 2002 (SSI 2002/336)
- The Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No. 6) (Scotland) Order 2002 (SSI 2002/337)

The text of these are available at: www.scotland-legislation.hmso.gov.uk/legislation/scotland/s-stat.htm

The main points you may wish to note are:
- the right to claim interest for late payment, given in the Late Payment of Commercial Debts (Interest) Act 1998 is extended to all businesses;
- the new right to claim reasonable debt recovery costs;
- the new right for “representative bodies” to challenge contractual terms that are grossly unfair, on behalf of SMEs;
- simplifying the calculation of the interest rate for late payment by fixing the rate for a six-month period - rather than fluctuating monthly as at present.

The Late Payment of Commercial Debts (Interest) Act 1998 shall apply to Advocates’ fees.

General guidance is available on the Better Payment Practice Group web-site: http://www.payontime.co.uk

Towards a Safer Society Conference

Violence: Origins, Assessment and Management is the theme of the Conference: between 8 - 11 September 2002 at the RSAMD, Glasgow

Major themes will include:
- The origins of violent behaviour
- Systematic approaches to the assessment of violence risk
- The management of violent offenders in the community
- Family violence and stalking
- Legal and ethical issues

Speakers will include Professor Stephen Hart; Dr Mark Ramm; Dr Caroline Logan; Professor Bill Marshall and Dr Michael Bettman.

Further information can be obtained on the Internet at: http://safersociety.gcal.ac.uk

Lawyers Christian Fellowship

Two events will take place in September to mark the 150th anniversary year of the LCF. The annual service will be held at Adelaide Place Baptist Church, Bath Street, Glasgow, on Friday 6 September 2002 at 7.30pm when the guest preacher will be Rev Peter Neilson (St Cuthbert’s Parish Church, Edinburgh). Everyone associated with the legal profession is welcome to attend. On Saturday 7 September Rev Peter Neilson will lead a day conference at The Royal Faculty of Procurators, 12 Nelson Mandela Place, Glasgow, on the theme “The Church at Work.” The conference is designed to appeal to anyone involved in any area of legal practice as well as those who give pastoral support to lawyers at work. Further information and booking form available from Craig Murray, MacArthur Stewart, 87 High Street, Fort William PH33 6DG (DX 531402) Telephone 01397 702455 (or craigm2455@aol.com). The conference fee is £50 for lawyers in full time work (£25 for others).

Closing date to enter the 14th international competition of counsel’s speeches is Monday 4th November. The competition is dedicated to the defence of human rights and will see lawyers from all over the world converge on Caen in January next year to hear those entries selected to be presented before the audience. For further details e-mail vdurel@memorial-caen.fr or visit www.memorial-caen.fr Applicants must write a speech denouncing a true and specific and individual example of a breach of human rights taken from current affairs.

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General guidance is available on the Better Payment Practice Group web-site: http://www.payontime.co.uk

The new legislation came into effect on 7 August
Commonwealth law conference

THE triennial conference of the Commonwealth Lawyers Association is to take place for the first time for many years in Australia.

The Law Institute of Victoria was successful in its bid to host the Conference in Melbourne on behalf of the Law Council of Australia. An organising committee has been busy planning for many months for this prestigious event, expected to attract a large number of delegates from the United Kingdom.

The Conference will offer topical and challenging business sessions combined with first-class entertainment and networking opportunities.

The Conference will take place on April 13-17, 2003. A significant number of eminent speakers from around the Commonwealth will attend to present papers to and participate in sessions at the Conference. They include:

Ms Cherie Booth QC, a leading advocate in Public law and European and Employment law, who was called to the Bar in 1976 and took silk in 1995. She is a Recorder and Bencher of Lincoln’s Inn. She has an extensive association with a number of charities and community groups, and holds various appointments with academic and cultural organisations.

The Rt. Hon. Christopher F. Patten, C.H., has held the position of European Commissioner for External Relations since 1999. Prior to that he was Governor of Hong Kong from 1992 to 1997. This appointment followed a distinguished 13 year term as a Member of Parliament during which he held appointments as Minister for Overseas Development at the Foreign and Commonwealth Office and numerous other front bench positions.

The Rt. Hon. The Lord Woolf of Barnes is the Lord Chief Justice of England and Wales and the recognised expert in litigation reform in the common law world following the publication of his Civil Justice Report.

Professor Penelope Andrews of the City University of New York Law School is an expert in human rights issues in South Africa and Australia (as well as the United States) with particular emphasis on the rights of minorities and women.

The Hon. Murray Gleeson AC is Chief Justice of Australia who formerly held the positions of Chief Justice and Lieutenant Governor of New South Wales. His honour will address delegates on the State of the Judicature.

The Rt. Hon. The Lord Phillips of Worth Matravers is the Master of the Rolls.

The Rt. Hon. Dame Sian Elias TGNZM, the Chief Justice of New Zealand.

The Rt. Hon. Beverley McLachlin, P.C., is the Chief Justice of Canada.

They will be joined by a host of senior judges, attorneys general and academics as well as senior practitioners. It will, without a doubt, be the most impressive faculty to any law conference in Australia in many years.

Many Melbourne law firms will be hosting events and there will be a range of social and recreational activities.

The Conference Chairman, Mr Mark Woods, said he hoped a large number of UK lawyers and their companions would attend. “It is a great opportunity for our British colleagues to visit Australia, combining what is sure to be a stimulating event with the opportunity to see a little of Australia.”

Melbourne has an outstanding reputation for its multi-cultural cuisine. “It’s a wonderful chance to bring the family at a time which coincides with UK school holidays,” said Mr Woods.

The SSC Society will be holding its Biennial Lecture on Friday 1st November 2002 at 7pm in the Saughton Hall, Parliament House, Edinburgh. The speaker this year will be the Solicitor General for Scotland, Elish Angiolini. There will be a sherry reception in Parliament Hall from 6.30 pm and applications for tickets should be addressed to Mrs Christine Wilcox, SSC Library, 11 Parliament Sq, Edinburgh, EH1 1RF, DX ED 209 Edinburgh 1, LP4 Edinburgh 10 or by e-mail to enquiries@ssclibrary.co.uk. Tickets are free and will be allocated on a first come first served basis.
Resolving parking disputes

My compliments on an interesting and very welcome article in the July issue. In the paragraph entitled “Civil or Criminal” there was mention of a Judicial Review of a Glasgow decision. The Judicial Review is mine, or at least I am the Petitioner.

The brief circumstances are that in Feb 2000 my vehicle was removed to a Glasgow pound regarding outstanding tickets. The vehicle was removed from a marked bay and the ticket I had placed on it had expired by a few minutes. I had no responsibility for the earlier tickets. I’d only just bought the car. At the pound I had to pay for the removal fine of £105 and the ticket fine of £20. I protested my innocence and appealed to the Parking Authority in Glasgow. I got a full refund but my appeal on the law involved was rejected. I appealed to the Scottish Parking Appeals Service (SPAS) and this was rejected after a hearing in the final appeal hearing. We are now at the stage of refining the issues between myself, Glasgow City Council, the SPAS and the Lord Advocate for the Scottish Executive for a continued first (or is it second?) hearing at the Court of Session. I have thus far taken the issue entirely on my own, but recently obtained opinion of counsel on some points. I seek the opinion of my learned colleagues across the country on the issues I have raised and continue to raise in a second matter progressing through the appeals stages. I have listed some questions and would be grateful for input and comment, by phone/fax etc or by e-mail to jbmgchechan@blueyonder.co.uk

1. The subject of the Judicial Review is whether the power to withhold the vehicle until the fine and ticket are paid in full, before any right to any form of hearing is available, is a breach of Article 6, whether the legislation is civil or criminal. Should there not at least be an option and procedure in the legislation to satisfy the car pound manager of one’s identity and fill in a form requesting a hearing?

2. Would the matter have been better suited to a Petition to the Noble Office rather than Judicial Review, as counsel’s opinion suggested?

3. The first appeal one can make under the parking orders is to the Parking Authority for the city. The one’s who want your money in the first place. An impartial tribunal?

4. The Parking Adjudicators are paid for by the Council, who want your money. Are they Impartial Adjudicators?

5. The Parking Authority will not allow me to precognose a parking attendant. I have attempted to cite the parking attendant and also the Parking and Transport Manager for Glasgow City Council in a forthcoming Adjudication hearing. Civil or criminal should one not be entitled to test the evidence and examine the witnesses?

6. What of the question of corroboration of the actions and observations of a lone parking attendant?

7. Is it possible to require the details of the computer records by serving a counter notice as per SI1969 No 1643 (Act of Sederunt) Computer Evidence in the Sheriff Court 1969?

8. Does anyone have any useful pointers and would anyone else like to help or get involved?

Bunny McGeechan, trainee solicitor, Beaumont & Co, Pitlochry

Far from plain speaking

The paragraph from “Language on Trial” quoted by Ellis Simpson in his piece on Plain Speaking is not a happy one. There is no myth about legal gobbledygook (itself a slang word and as such ambiguous in the context); there may be a mistaken belief but that is something different. “A vital part” is a cliche, “abilities in communication” is incomprehensible, “the vast majority” just means “most” and it is not made clear whether the three reasons finally given are alternative or cumulative.

Further Mr Simpson’s chosen alternatives are not true ones and it would be rash for a lawyer to assume that they are. In particular, an instrument is not the same as a document, concluded does not mean the same as ended, consideration does not mean the same as price, “we hereby undertake” can be very different in its consequences from “we undertake” - one could go on. What is important is knowing what you are trying to say. Language will follow. Some writers (like F. Scott Fitzgerald) write simply; some (like Henry James) do not. As for the Plain English Campaign, they are luddite puritans whose cats are barking up the wrong flagpole.

Sheriff Andrew Lothian
Group’s 31 seminars

We are at the beginning of another exciting cycle of events for the In-House Lawyers Group. We have 31 seminars coming up over the next year, covering a wide range of topics, which will hopefully be of use and interest to you all.

As you know, we are intending to video link as many of these seminars as possible and will require to obtain sponsorship or payment to achieve this end. These seminars represent very good CPD and it is hoped that those organisations employing a large number of our members will be prepared to support the video linking proposals with a view to reducing their CPD costs. Colin Anderson your Vice Chairman and I will be talking to the management of a variety of organisations with a view to achieving this end.

This year we have decided to invite non In-House Lawyers to attend these seminars at a cost of £40 per head. With this in mind, please do not sign up as an attendee unless you intend to be there and please advise Tricia Sim (0131 476 8133 e-mail triciasim@lawscot.org.uk) at the Law Society if you are unable to attend so that places can be allocated to other interested parties.

Thanks to all of you, nearly 300, who attended the celebration seminar and dinner “Some Like it Hot” in Dynamic Earth in the spring. It was a really stunning event and we certainly increased the group’s profile in the legal and business world. I believe that everyone had a great time and networked outrageously. On behalf of the group I wish to reiterate our thanks to our main sponsors Tully International Recruitment and Legal Week, and, of course, Marsh UK for the champagne reception (now I bet you wish you’d made the effort!) and last but not least all those firms of private practitioners and businesses who took tables and invited clients and guests. Thanks to the generosity of our sponsors we were able to keep the costs for a full afternoon seminar and a fantastic networking and social event to £60 + VAT for members. I doubt you can get better value CPD anywhere.

Are we planning another? You bet and there will be more information as the scene unfolds – but for now, keep September 2003 open in your diaries. The 20th Anniversary Conference of ECLA will be held in Edinburgh in conjunction with the dinner.

In conjunction with the Law Society’s computer guru Gordon Brewster we are hoping to set up a number of e-mail discussion groups as a method of self help for those tricky legal problems and as an effective method of sharing information on a variety of different areas of the law. For myself I’d be interested to talk to people on licensing, planning & environmental law and access to the countryside. If such a service would be of assistance, then Gordon would be delighted to hear from you as such information would be extremely helpful as he develops his plans and seeks approval.

Thanks for your support – the In-House Lawyers Group only exists because of your efforts. Let us know if there is anything we can do to help you we are open to your ideas on seminars, discussion groups, events, speakers and are here to be of assistance if you have any problems. We are all fortunate that we have effective, accurate and prompt support from the Law Society’s expert staff who are always there to advise and assist.

I hope you have all had a refreshing summer – singing in the rain if you stayed at home like me. I look forward to seeing as many as possible of you either in the flesh or on the screen throughout the year.

Janet Hood
Chairman In-House Lawyers Group

Will Aid volunteers wanted

Will Aid will be operating again in November this year and I hope that all solicitors in Scotland will take part. After all it was here that it all began.

The publicity people are still looking for real examples of those who have suffered because their loved ones failed to make a Will. For decades and decades solicitors have tried to get the message across to the public that it is vital to make a Will and while we may be beginning to win that battle, nevertheless there are far too many who still die intestate. The more true life examples that can be given of the problems that arise the better, of course, appreciate the problems of confidentiality and sensitivity but if any solicitors know of the sort of cases I am referring to and can persuade those involved to go public (in whatever way they want) it would be most helpful if they could get in touch with me – by phone, fax, e-mail, LP or normal mail.

Graeme Pagan, Hosack & Sutherland, LP1 – Oban
mail@hosacks.co.uk
BELL & SCOTT, WS, Edinburgh, intimate that Bruce Anderson retired as a partner on 30th April 2002 and are pleased to announce that Paul Reilly was assumed as a partner on 1st May 2002.

CROZIERS, 21 Station Road, Dumbarton, hereby intimate that Joan Crockett resigned from the firm as at 1st July 2002. Graeme W I Davidson has been appointed as Managing Director of REGULATORY SOLUTIONS LIMITED with effect from 15th April 2002 and has been assumed as a partner in the CITY LAW PARTNERSHIP with effect from 1st July 2002, following 9 years with THE ROYAL BANK OF SCOTLAND GROUP where he was Head of Legal and Regulatory Compliance, Group Compliance Department. His focus will be on financial services regulatory/compliance matters. His contact details are Regulatory Solutions Limited, 99 Charterhouse Street, London, EC1M 6NQ, telephone 020 7251 6681, fax 020 7251 6683, e-mail: graeme@regsolutions.co.uk; and City Law Partnership, 99 Charterhouse Street, London, EC1M 6NQ, tel 020 7253 5505, fax 020 7253 5525, e-mail: graeme@citylaw.com.

HENDERSON BOYD JACKSON, WS, Edinburgh and Glasgow, intimate that Andrew Walker and Andrew Lothian have both been assumed as partners in the firm.

A & S IRELAND, 131 West Nile Street, Glasgow, and 138 Ayr Road, Newton Mearns, are pleased to announce the assumption of their associate, Christine Heather MacDiarmid, as a partner of the firm with effect from 1st July 2002.

JARDINE DONALDSON, 18/22 Bank Street, Alloa, announce that Fiona E Dearing has retired as a consultant with the firm with effect from 30th June 2002.

MACLAY MURRAY & SPENS, Glasgow, Edinburgh, London and Brussels, intimate that Andrew Hardie Primrose retired from his position as partner on 31st May 2002.

PETERKINS, Aberdeen, Glasgow, Inverurie and Banchory, intimate the resignation of Colin E Forbes from the partnership with effect from 30th June 2002.

Alistair J Robertson, Peebles, who has carried on practice on his own account under the name ALISTAIR J ROBERTSON SSC at 31 Gallow Hill, Peebles, intimates that he has retired from practice with effect from 31st July 2002.

SIMPSON & MARWICK, Edinburgh, Glasgow, Aberdeen and Dundee, are pleased to intimate that their associate Ranald Macpherson has been assumed as a partner with effect from 1st May 2002 and that Frances McChlery, formerly of Dundas & Wilson, has joined the firm as a partner with effect from 1st June 2002. Their assistant, Joy Geekie, has been appointed as an associate. Ranald Macpherson will continue to be based in the Edinburgh office, now at Albany House, 58 Albany Street, and Frances McChlery and Joy Geekie are based in Glasgow.

GRAHAM WALKER, Glasgow, are pleased to announce that their associates, Ian Sievwright and Thomas Docherty, have both been assumed as partners with effect from 1st June 2002.
FORTHCOMING EVENTS

(CPD HOURS IN BRACKETS)

AUGUST
22nd In House Lawyers Group – IT Contracts, Edinburgh (1.5)
28th Summary Cause Roadshow, Aberdeen (2.5)

SEPTEMBER
3rd, 17th Accounts Rules for Cashroom Staff, Edinburgh, Glasgow (3.75)
3rd In House Lawyers Group – Employment Law Update, Edinburgh (1.5)
4th, 9th Summary Cause Roadshow, Dundee, Edinburgh (2.5)
5th Trusts & Executry Administration for Paralegals, Glasgow (5.5)
10th Tribunal Advocacy, Edinburgh (6.5)
10th, 11th Financial Services Roadshow, Aberdeen, Inverness (1.5)
11th In House Lawyers Group – Land Register Reports (1.5)
12th, 26th Staff Management Workshop, Aberdeen, Glasgow (3.75)
17th In House Lawyers Group – E-Commerce Update (1.5)
18th, 24th Financial Services Roadshow, Ayr, Dundee (1.5)
18th, 25th Rent Review Workshop, Glasgow, Edinburgh (2.5)
19th Trusts and Executry Update, Aberdeen (4)
24th Preparing for Partnership/Setting Up On Your Own, Edinburgh (6.5)
27th Personal Injury Conference (with APIL), Glasgow (5)

OCTOBER
1st Accounts Rules for Cashroom Staff, Aberdeen (3.75)
2nd Trusts & Executry Update, Edinburgh (4)
3rd In House Lawyers Group – Competition Law, Edinburgh (1.5)
7th, 10th Financial Services Roadshow, Glasgow, Edinburgh (1.5)
8th Nothing But The Net, Glasgow (6)
10th Staff Management Workshop, Edinburgh (3.75)
11th Solar Conference & Half yearly Meeting, Dundee (3.5)
15th In House Lawyers Group – Lockerbie Retrospective, Edinburgh (1.5)
22nd Management for Family Lawyers, Edinburgh (4)
23rd Time Management, Edinburgh (2.5)
23rd Making Use of Information Technology, Glasgow (2.5)
25/26th Legal Aid Conference (12)
29th Employment Law Bill, Edinburgh (6.5)
30th Managing Employees, Edinburgh (2.5)
30th Fees & Feeing, Glasgow (2.5)
30th Achieving Effective Cross Selling, Edinburgh (7.5)
31st In House Lawyers Group – Health & Safety Update, Edinburgh (1.5)
31st Financial Provisions on Divorce, Edinburgh (3)

NOVEMBER
5th In House Lawyers Group – Judicial Review (Solicitor General), Edinburgh (1.5)
6th Marketing, Edinburgh (1.5)
6th Time Management, Glasgow (1.5)
7th Achieving Effective Cross Selling, Glasgow (7.5)
13th Managing Employees, Glasgow (1.5)
13th Managing the Finances, Edinburgh (1.5)
14th In House Lawyers Group Symposium and AGM, Stirling (4)
14th, 28th Client Nirvana – The Proactive Professional, Edinburgh, Glasgow (7.5)
19th TUPE & Business Re-Organisation, Edinburgh (6.5)

For further information in connection with our seminars, please contact Update at the undernoted address.

Update, The Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh, EH3 7YR
Document Exchange Box: ED 1 Edinburgh, Legal Post, LP1, Edinburgh 1
Telephone: 0131 226 7411 Fax: 0131 476 8118 E-mail: update@lawscot.org.uk
What price the core values

The Law Societies of Scotland, Northern Ireland and Ireland are united in their opposition to the so-called Tesco Law. An annotated version of this article appeared in last month’s Journal.

Over recent months we have followed with interest the debate on the future regulation of legal services provision by solicitors in England and Wales, the main focus of which has been the prospect of such services being provided to third parties on a commercial basis by supermarkets and others. We have done so with increasing concern and astonishment because what seems to be up for sale is the independence of the solicitors’ profession - together with the fundamental rights of every citizen which this independence protects. What is at stake are the core values which define the identity of lawyers in independent practice (that is to say guaranteed independence, avoidance of conflicts of interest, and client confidentiality). Failure to understand and protect these values will result in irreversible damage to the interests of individual consumers of solicitors’ services and the public interest.

We take as given that this debate should not be feared. It will always be incumbent on the profession to make sure that its regulatory systems and content are fit for purpose and adapted to take account of changing social and economic conditions. Where any practice or regulation, properly understood, is restrictive of competition and not otherwise justified we would not seek to defend it. But the core values are not negotiable. We need to assert this without equivocation no matter how inconvenient or out of line with policies of the moment or commercial expediency.

We are concerned first about a Nelsonian eye being turned to recent developments, particularly the European Court of Justice decision with regard to the Bar of the Netherlands. In this case, the court upheld the ban on multi-disciplinary practices between accountants and lawyers in Holland. This dealt directly with the interface between competition and the core values. It cannot be dismissed as dealing only with different circumstances peculiar to the Netherlands, or exclusively with competition issues, or with the particular structure of a multi-disciplinary partnership between lawyers and accountants. The court validated an absolute regulatory prohibition on any form of mixed control partnership, which was implemented by the Dutch Bar in substitution for a more limited prohibition precisely because the absolute ban was considered to be the minimum necessary to protect the core values.

Therefore, the true implications of the Dutch decision are that the court regarded issues of structure and control as of importance; recognised that effective regulation was necessary to guarantee and protect consumer interests by securing core values, and confirmed scepticism as to the efficacy of cosmetic processes such as Chinese walls.

The case could not be more apposite. It is of significance because the ultimate judicial authority on EC competition law and principles (on which principles UK competition law is based) has made clear that the legal profession's core values must not and should not be sacrificed to the god of competition.

Everything about our understanding of the real-world tells us that unbridled commercialism will not work in the public interest, and that there has never been a greater need than now for genuine and guaranteed independence of solicitors’ services. No solicitor can serve two masters, and he who pays the piper will ultimately call the tune. It is naïve and against all the evidence to think that the core values can be preserved effectively without regulating and controlling the structure within which the services are delivered.

This point is captured in the current American Bar Association resolution, which states: “The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession.”

The media coverage appears to have been dominated by briefings from the proponents of the proposals with no serious attention being given to the core values and the real world implications of the planned de-regulation. Every impression is given of unquestioning acceptance of the premise that the present evolved regulatory framework is an elaborate conspiracy by lawyers against an unsuspecting public. That premise is wholly wrong. The tools of regulation of the legal profession have been based on the public interest, designed to preserve the core values effectively, and forged on the anvil of experience. That is why they deal both with the regulation
of individual practitioners and the context in which they practise. The lack of recognition of this creates a self-fulfilling caricature of the solicitors’ profession as reactionary, protectionist and out of date.

These views are offered as a contribution from a different and perhaps detached perspective which we hope will help to ensure that all relevant arguments are addressed and debated openly and in a more balanced way. It is understood that the de-regulation proposals as initially proposed will proceed only if some way can be found of ensuring that third party clients of an employed solicitor can be guaranteed the same effective levels of protection as under the present regulatory structure. For the reasons we have set out most lawyers might well feel that this will prove to be an impossible task.

For all lawyers there is a common position which should unite us: the core values are not for sale. These permanent values are more important than commercial expediency. All that we know as lawyers tells us that these values will always be subject to attack will always need to be defended and should not be compromised. Who is going to defend the core values, by definition, if not a genuinely independent legal profession? Here we should stand - we can do no other.
“It’s good to talk”

Professor John Sturrock QC of Core Consulting and Core Mediation says the profession must act to allay misconceptions about the way it operates

“All that’s ever missing is a conversation”. These were the words of Larry Farmer, formerly CEO of a multinational group of companies, in his keynote address to the Edinburgh Conference of the Chartered Institute of Arbitrators last September. They reflect the awareness that in commerce and industry many disputes arise because of a simple failure in communication. Communication is either absent altogether or flawed in some way, leaving ample scope for misunderstanding, false assumptions or misconceptions. There are usually two sides to a story: it all depends on your perspective on events. Often, we see only one side.

Recently, we have seen a number of examples in Scotland of misunderstanding and misconceptions about the operation of the legal profession and the administration of justice. These have included the role of sheriffs and to whom they are accountable, the position of sentencing judges, the application of human rights legislation in politically-charged areas, the role of professional organisations as disciplinary bodies for their members, the level of fees apparently charged by the profession and the conduct of advocates in criminal appeals. Various groups are critical or sceptical about the law and those within it. Sometimes criticism comes from within. Sometimes the criticism or scepticism is justified - or motivated by ill-feeling. Often, though, it seems to stem from a lack of a full understanding of the legal system and the roles played within it.

The advent of the Scottish Parliament has created an entirely new situation for the legal profession. It may well be the case that those involved in decision-making are not fully aware of the way in which the profession works nor of how justice is administered in Scotland. That is quite understandable. There may be a similar ignorance among many lawyers of the imperatives and interests which drive policy. A natural instinct in a situation like this is for the profession to feel threatened by the decision-makers. This can, of course, produce confrontation. Conversely, of course, it may be that the decision-makers themselves feel threatened by the institutions of the law and tend to react against them. In both cases, misunderstanding and misconceptions can be damaging.

There must be scope for a conversation between key players in the legal system and the decision-makers in order to reduce misunderstanding and allay misconceptions. There must be much to be gained from discussing the benefits which a robust and independent legal system, profession and judiciary can bring to the people of Scotland, especially at a time of increasing legislative and administrative activity in Scotland. A thriving system of justice will be good for a thriving Scotland.

Such a discussion would be rigorous on central issues such as independence, but at the same time respectful of the position and needs of those who form and implement policy. A conversation which informs and enlightens on all fronts could be the platform for a successful review of the justice system. What about a Justice Forum, chaired by an independent facilitator, to encourage such a conversation?

Training the Bar

For the past eight years, it has been my privilege to serve as the first Director of Training and Education in the Faculty of Advocates. As I move towards the end of that role, it is interesting to reflect on the changes which have occurred in training for the Bar.

Before 1994, workshop-based advocacy training was practically unheard of in Scotland. Since then, 150 members of the Faculty have undertaken the eight weeks of structured training which the Faculty provides prior to admission, covering the whole range of basic advocacy skills. A further 100 or so have undertaken week-long training courses. 50 members have trained specially as advocacy instructors. We have been welcomed as leaders in advocacy training around the world. It can be said that, for many, advocacy is now approached more analytically and thoughtfully than ever before. This is best exemplified in the question which we encourage advocates always to ask themselves: “Why am I asking this question of this witness at this time in this way?”

Perhaps the training programme helps explain why the Faculty continues to attract large numbers of entrants. It brings with it another challenge however - a challenge which was addressed by all of the independent bars at the recent World Bar Conference in Edinburgh. Should competence in advocacy skills now be assessed and those deemed incompetent excluded from practice? If so, what criteria would apply and how would testing be achieved? These questions will engage us in the years ahead.
Homeowner logbooks a step too far

In the second in a series of articles about the Housing Improvement Task Force, Linsey Lewin writes that the Society’s Conveyancing Committee is active in promoting the retention of caveat emptor and resisting suggestions that homeowners should keep logbooks of repair work.

As I explained previously in an article which appeared in the Journal in February 2002, on 12 December 2000 the Minister for Communities announced the establishment of the Task Force. To recap, it was set up to consider:

- the forms of financial assistance available for owner/occupiers;
- the powers available to local authorities to compel private owners to invest in the maintenance of their properties;
- the likely effect of providing better information as part of the house purchase process—taking account of proposals for sellers’ surveys and sellers’ packs;
- the arrangements in place for the management of flatted blocks in private ownership;
- the proposals for stronger regulation of the private rented sector, for example by extending the existing arrangements which have been introduced recently for houses in multiple occupation; and, lastly,
- the effect of tenancy legislation in the private rented sector.

I also explained how the Task Force was going to set about its work, how its membership was made up and that its Sub-Group B would be considering the house buying and selling process in Scotland. It is the work of this Sub-Group in which the Society’s Conveyancing Committee is most interested and I would now like to bring you up to date with some of the matters currently being discussed following the publication of the Task Force’s initial report in May this year.

The report deals with all the issues being considered by the Task Force but I will restrict my comments to the section dealing with the house buying and selling process and in particular the main key conclusions that have been reached by Sub-Group B following Stage 1 of its deliberations. I would like to make two points before considering these conclusions. Firstly, you may be interested to note that the work of Sub-Group B was informed by a report, which it commissioned from DTZ Pieda Consulting. That report examined how well the information needs of house buyers were served by the current system and the impact this has on investment and housing quality. It looked at these issues from the viewpoint of first time buyers, purchasers who had previously bought a house, people exercising the Right to Buy and the professionals involved in house buying and selling. Secondly, Sub-Group B has commented that there are a number of strengths in the current system that need to be retained. They have made the point that it is reasonably quick, largely free from gazumping and provides outcomes that are generally predictable. They have also noted that most buyers and sellers are satisfied with the way the system works. This notwithstanding, they are still proceeding to examine the system, and they appear, from the Conveyancing Committee’s interaction with them, intent on changing it in a number of important respects.

I should also point out that there has already been an opportunity for any interested party to comment on the key conclusions (although it seems that few solicitors have so far chosen to do so individually) and during Stage 2 of the Task Force’s proceedings, which will commence in September, I understand that the various Sub-Groups will start to formulate proposals for consideration by the Scottish Executive.

A SELECTION OF THE KEY CONCLUSIONS:
Those of most relevance to the profession are:

- There is an absence of any obligation to disclose defects and this may lead some sellers to attempt to conceal repair problems from potential buyers.

It is as a result of this key conclusion that one of the policy options now being looked at by the Task Force is whether to legislate to abolish or modify the principle of caveat emptor.
The Conveyancing Committee believes that the principle of caveat emptor should be retained. Assuming that sellers’ surveys are not introduced, it is not thought sensible to change the policy whereby the purchaser has the property surveyed before lodging a formal and binding offer, rather than relying on implied warranties given by the seller. The Committee does however consider that solicitors should, in all cases where the property is over 10 years old and therefore not covered by the NHBC ten year protection certificate, attempt to persuade their clients to meet the cost of a Scheme 2 condition report (as opposed to merely getting a valuation report).

The majority of buyers opt for a mortgage valuation report from the surveyor even although this provides little information on the condition of the property.

The practice of setting closing dates at short notice can sometimes lead prospective buyers to make decisions and offer before they have had an opportunity fully to consider the results of an inspection or survey report.

A significant number of buyers face large unexpected repair or improvement bills after the first year of purchase.

As a result of these three conclusions, the Task Force is now actively considering a policy option that the contents of existing survey/valuation reports should be altered/expended and that legislation be introduced to require sellers and/or sellers’ agents to give prospective buyers a minimum notice period before the setting of closing dates for offers. The Committee considers that there are adequate guidelines relating to the setting of closing dates.

- Homeowners should be required to keep logbooks of repair work and make these available to prospective purchasers.

This is another key conclusion that relates to running and maintenance costs. The Conveyancing Committee has serious reservations about whether or not these would actually work in practice without legislative guidance as to their content. The Committee also has concerns about whether the logbooks might actually lead to longer missives as solicitors negotiate about the evidential status any logbook should have and finally the concept cuts across the principle of caveat emptor which the Committee supports.

- Whilst providing a clear outcome for both buyers and sellers, blind bidding may have an impact on other aspects of the process including multiple surveys and house price inflation at a localised level. This is also a key conclusion, which has resulted in a policy option that alternatives to the system of blind bidding should be evaluated. It has also been concluded that low “upset” prices and high levels of competition are likely to be factors in stimulating multiple surveys.

The Committee agrees with these conclusions. It is, however, satisfied that despite some indications to the contrary the problem of multiple surveys is only significant in a small number of “hot spots”, particularly central Edinburgh and the west end of Glasgow, and even in these areas the Committee considers it is not so much the system of blind bidding that results in multiple surveys for the same property but more the imbalance between supply and demand. However, it is accepted that a contributing factor to the problem of multiple surveys is the practice, which the Committee deplores, of setting artificially low “upset” prices which can and does result in many prospective purchasers incurring considerable needless expense on surveyors’ fees in offering for houses in price ranges which they can afford but which the sellers have no intention of accepting.

Turning to the question of blind bidding itself, while the Committee does not feel that the system is totally satisfactory there are difficulties with other systems. A private auction system using the Internet may in the future have merit but technology is not in place for such a system to operate effectively at this stage.
The Task Force is also considering introducing some form of sellers’ pack so that the sellers or their agents will provide standard information to prospective purchasers.

The Conveyancing Committee has no difficulty with the concept that sellers’ packs should be prepared prior to a sale of property both domestic and commercial. They consider that these might shorten the period before missives are concluded because all the usual pre-contract enquiries and requisitions will be answered at the outset. They also hope that clients may instruct solicitors at an earlier stage to engage all the documentation if sellers’ packs are made compulsory. That would be positive. What the pack is to comprise may be more problematic. The Committee has however concluded that included in the pack should be the title deeds, a Coal Authority report (if appropriate), any planning permissions, building warrants, completion certificates, guarantees etc and an independent condition survey report. The Committee also considers that it would be of great benefit if property enquiry certificates were included in every case. However, they appreciate that in many areas of Scotland properties are not being sold in “hot spots” and may be on the market for some time with the ensuing difficulty that property enquiry certificates will expire and need to be re-ordered at an additional cost to the client. The Committee is of the view that the Executive could be asked to look at the proposition that in depressed/deprived areas, property enquiry certificates should be provided free of charge by the Councils, thus alleviating this difficulty to some extent. The Committee however accepts that a negative feature of such surveys will be that in certain areas, particularly during periods when the market is generally depressed, situations will undoubtedly arise of sellers put to abortive expense where the property fails to attract an acceptable offer within the “currency” of the survey report.

FURTHER OPTIONS

Other policy options under active consideration relate to the amount of information buyers and sellers are given about the repair and maintenance obligations contained in title deeds. Information the Task Force has received via the DTZ Pieda Consulting research* has resulted in it concluding that the average house buyer and seller does not understand such obligations and goes into the process with insufficient clear information available to them. This has led the Task Force to consider whether or not there should be additional best practice guidelines produced for solicitors and other professionals to ensure that prospective house buyers and sellers are given adequate good quality information on house buying and selling procedures and about the costs of repair and maintenance obligations arising from title deeds.

The Conveyancing Committee favours some form of independent condition survey report without a valuation being included

Committee favours some form of independent condition survey report without a valuation being included

process with insufficient clear information available to them. This has led the Task Force to consider whether or not there should be additional best practice guidelines produced for solicitors and other professionals to ensure that prospective house buyers and sellers are given adequate good quality information on house buying and selling procedures and about the costs of repair and maintenance obligations arising from title deeds.

The Conveyancing Committee would argue that there are already sufficient Society guidelines to cover these matters but it may be that solicitors need to consider how they present information to their clients. There is a need to ensure that people get the information in a form they can digest and understand. The Committee accepts that this may not always be happening and that there may be scope here for an education process amongst the profession.

In addition we are advised that the Task Force are considering the scope for introducing standard missives. This is something in which the Committee is interested. We have not forgotten that we looked at standard missives before but we think there may be scope for revisiting this with a better draft and we are also actively trying to improve Builders’ Missives by liaising with Homes for Scotland.

Finally, we are advised that with a view to encouraging the uptake of independent sellers’ surveys, the Task Force is looking at the form such encouragement might take and the scope for legislation to require sellers’ surveys with or without energy efficiency and disability audits and valuations. On balance, the Conveyancing Committee favours some form of independent condition survey report without a valuation being included.

It is clear that scrutiny of the buying and selling process, which is only one aspect of the Task Force’s remit, is broad-ranging and hard-hitting and covers a number of long-established procedures of Scottish conveyancing practice. There is huge pressure on us as a profession to move swiftly to provide views in relation to such issues, especially since the Task Force is apparently to wind up and give its conclusions to Ministers by the end of this year.

The Conveyancing Committee’s position is that while the policy initiative behind the Task Force, namely to improve Scotland’s housing stock, is laudable, matters are moving forward too swiftly and without the consultation we regard as necessary. We consider that
because the whole of the house buying and selling process is under scrutiny under this wide remit, the profession should have more input into the decisions to be taken by the Executive. The Conveyancing Committee wishes to play its part in influencing the Executive’s decisions if possible and is keen to ensure that the interests of solicitors are highlighted and understood. For this reason we want you to be fully aware of the Task Force and we would like you to make your views known to us about changes to the house buying system and especially whether or not you favour the options being evaluated by the Task Force. I would urge you to look at the Task Force web-site which can be found at www.scotland.gov.uk/hitf and review the key conclusions in more detail.

We have come to some preliminary conclusions about these issues being discussed and would also very much welcome your comments on these. A number of these have provoked considerable debate among the members of the Committee and not all have secured unanimous approbation. They have however been agreed against the background that the Task Force is most unlikely to accept the current status quo, given the political impetus to change some key aspect of the current Scottish house-buying process and the developments about this in England and Wales. We therefore need to move with the reform process and seek to amend any proposal that, in our opinion, would not work in practice.

CONCLUSION

We have views on all the issues being looked at by the Task Force. There is not time to rehearse all of these in this article but if you are interested and want any further details please do not hesitate to contact me and I will be more than happy to provide you with these. I will in due course write about Stage 2 of the Housing Task Force but would emphasise how essential it is for solicitors to be aware of this process and engage in it. It does concern you if you are a conveyancer and now is the time to have your say if you wish to have any effect on the future process of buying and selling houses in Scotland.

* One of the main findings of the DTZ Pieda Consulting Report is that 46% of non RTB purchasers did not get any advice on the house buying process.

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The so-called Judicial Appointments Board for Scotland has at last arrived to something less than a fanfare. Many of the profession would be unaware of its very existence until they saw notices in the Scots Law Times of 21st June 2002 inviting applications for appointment to the office of Judge of the Court of Session and also Sheriff Principal of Lothian and Borders. One reason for this is that the Scottish Executive bungled the public announcement of the creation of the Board with the result that only one national Scottish newspaper gave column space with details of the Board members. The membership of the Board should have been made public at the end of May but the information did not appear on the Scottish Executive website until Tuesday, 11th June. The Scottish Executive Justice Department had, however, announced back on 8th April that Sir Neil McIntosh, who was Chief Executive of Strathclyde Region from 1992 until it was disbanded in 1996, would be Chairman of the new Board. The decision to appoint a layman as opposed to a lawyer as Chairman is unique in Europe, France, Italy, Portugal and Spain, for example, all have judicial self-governing bodies to control judicial appointments. Some might consider it extraordinary to appoint a lay chairman considering that the Justice (Northern Ireland) Bill presently winding its way through Parliament provides for the setting up of a judicial appointments commission for neighbouring Northern Ireland with the Lord Chief Justice as Chairman together with five judicial members, five lay members and one legal profession member.
The new Scottish ad hoc Board has three judicial members, two legal profession members and five lay members, including the Chairman. Membership of the Board is as follows:

Sir Neil McIntosh; Sir Robert Smith, Vice Chairman of Deutsche Asset Management; Professor Joan Stringer, Principal of Queen Margaret University College and soon to be Principal of Napier University; Mrs Barbara Duffner, Head of Personnel North for Royal Mail plc; Professor Alan Paterson of Strathclyde University who is Director of the Centre for Professional Legal Studies; The Right Honourable Lord Maclean, a Judge of the Court of Session; Sheriff Principal Bruce Kerr, QC; Sheriff Principal of North Strathclyde; Sheriff Douglas Allan, Sheriff of Lothian and Borders at Edinburgh and a past President of the Sheriffs’ Association; Colin Campbell, QC, Dean of the Faculty of Advocates, and Michael Scanlan, Solicitor and former President of the Law Society of Scotland.

No provision appears to have been made for substitutes for this new Board. It is almost inevitable with a membership count of ten that all members will not be able to attend candidate interviews or a member will require to disqualify herself or himself from Board interviews due to some conflict of interest. Astonishingly it could mean that members of the judiciary, and there are only three, could be absent when candidates are being interviewed for possible nomination for the judiciary. Perhaps it is not seen as a problem by the Scottish Executive when it is remembered that Jim Gallagher, Head of the Scottish Executive Justice Department, a member of a previous ad hoc selection board, merely excused himself from interviewing one candidate considering it appropriate to sit in on all the other interviews.

Jim Wallace, QC, the Justice Minister, in March 2001 announced that the Scottish Executive intended to establish a judicial appointments board whose members will be appointed following Nolan procedures. The Scottish Executive has, however, failed to follow Nolan procedures. There has been no public announcement of how those selected were nominated. There has been no information on whether any Board member has been involved in any political activity in the last five years. There has been no information on length of appointment. There has been no confirmation of remuneration to be paid to Board members. However, readers will be interested to know that 119 applications were received for lay member posts after advertisement. An interview panel was set up by the Justice Minister consisting of Lord Ross, former Lord Justice Clerk, and the aforementioned Jim Gallagher, with Alastair Dempster, former Chief Executive of TSB and presently Chairman of Sportscotland, as independent assessor. Interviews for possible appointment to the Board were completed in February 2002. It is understood that the Lord President of the Court of Session nominated Lord Maclean as a Board member; the Sheriffs’ Association nominated Sheriff Allan and the Sheriffs’ Principal nominated Sheriff Principal Bruce Kerr, QC. It is not known how Colin Campbell, QC, or Michael Scanlan were appointed. It is not known how many applications were received for legally qualified member posts following public advertisement.

The Chairman, Sir Neil McIntosh, is understood to have been appointed for a period of three years at a salary of £7,500. The time commitment is expected to be two days per month. That works out at £312.50 per day. Other lay members of the Board are to receive £170 per day. Considering that Dyno-Rod won’t come out for £170 per day, the Justice Minister is clearly expecting quality without paying for it. It has to be concluded that lay members are undertaking their responsibilities out of a sense of public duty. The three judicial members of the Board will, of course, receive no additional remuneration. Another sacrifice to be noted is that Colin Campbell, QC, as Dean of the Faculty of Advocates, would be a prime candidate for appointment to judicial office but by agreeing to sit on this new ad hoc judicial appointments board he has disqualified himself from any judicial appointment during the life of this Board.

Apart from the debacle of the public announcement of the setting up of the Board, the singular failure of the Justice Department to have any public debate whatsoever on the structure and content of the Judicial Appointments Board has not assisted the Board’s credibility. The Justice Minister has indicated that legislation will be introduced to establish a Board with Parliamentary authority ‘when time can be found’. What Jim Wallace, QC, is asking the profession in particular and the public at large to believe is that time has been found for pieces of draftsmanship such as the Dog Fouling (Scotland) Bill and the Fur Farming (Prohibition) (Scotland) Bill to come before the Scottish Parliament but no time could be found for a Bill to set up a body as constitutionally important as a judicial appointments board. Sadly, the only Parliamentary questions asked concerning judicial appointments were questions...
seeking assurances from the Justice Minister that masons and members of secret societies would not be appointed. It is seriously disappointing that this has been the level of interest by members of the Scottish Parliament but it is substantially due to the behaviour of the Scottish Executive in setting up the Board. There is serious suspicion that within the Scottish Executive coalition there is a strong group against the creation of a Board with authority to make judicial appointments. The failure to have public debate and statutory authority for this Board has not bolstered public confidence. It has certainly not brought the legal profession on board.

This Judicial Appointments Board for Scotland is just another ad hoc board. It has no power or authority. Authority for appointment of our Judges and Sheriffs will remain with the Scottish Executive. There is no obligation whatsoever on the First Minister or the Justice Minister to appoint a particular individual nominated by this Board. Disturbingly, the Lord Advocate will still be involved in the nomination process despite the fact that the profession has had enough of the criticisms of patronage and cronyism in appointments. Jim Wallace, QC, when he announced in March 2001 the intention to set up a Board said ‘the Lord Advocate will no longer routinely advise on appointments but will advise the First Minister in any case of uncertainty about the Board’s recommendations’. This begs the question of how the Lord Advocate will know if there is uncertainty unless the list of nominations is passed to him for approval. And what on earth is a case of uncertainty where the Board has sifted applications and carefully interviewed candidates? Will it cover the situation where the Lord Advocate doesn’t think that a particular face will fit? The Lord Advocate, as another prime candidate for judicial appointment and an individual in the midst of political activity, should not be involved in any way in the appointment process.

Board members will require to observe confidentiality in their deliberations and nominations. Only they, in theory, will know if their nominations are accepted and, if accepted, in the order they are provided. It remains to be seen if any Board member will find his or her position untenable if the First Minister and the Justice Minister (and the Lord President of the Court of Session in the case of the appointment of a Judge of the Court of Session) do not accept their recommendations and in the order provided.

The Latimer House Guidelines adopted by member countries of the Commonwealth in 1998 deal, amongst other things, with judicial autonomy. The guidelines point to judicial appointments being made on merit by a judicial appointments commission established by statute or by constitution. Until this happens in Scotland, The Judicial Appointments Board for Scotland is a misnomer. It should be called The Judicial Appointments Recommendations Board for Scotland.

Jamie Gilmour is a former secretary of the Temporary Sheriffs Association
Changed Days

Sheriff Andrew Lothian writes that with the introduction of family courts, drugs courts and negotiating small claims, judges are being removed from their role of impartial umpire.

When the small claims procedure was first introduced, a proposal was made that rather than having yet another attendant set of rules to accompany the resolution of disputes about badly mended shoes and so on there should be none at all. It would simply be left to the judge to get things sorted out in the most appropriate way. This mode of jurisprudence we call “palm-tree justice”, often vulgarly but erroneously associated with colonialism generally and district officers in particular. In fact the term comes from the Old Testament and relates particularly to the first female judge, Deborah. (Judges 4.4) Anyway the offer that small claims should just proceed as accords was turned down.

The great English jurist Blackstone said that delay and expense was the price of justice. Lord Mackay of Clashfern in his Hamlyn Lectures “On the Administration of Justice” pointed out that if there was a quick, cheap and fair way of doing justice in the traditional way it would have been found by now. He went on to suggest that what people who bring cases into court really want may not be an evidential hearing and verdict but rather something like mediation leading to an apology. Anyway so far as small claims go, to judge from the new rules we would seem to have moved slightly closer to Deborah and her Palm Tree. Sec 9.2 (b) provides that at the Hearing the sheriff shall "seek to negotiate and secure settlement of the claim between the parties." This may present difficulties but that the framers of the rules considered that there may be prospects of success is evidenced by the fact that the next subsection begins with the words “If the sheriff cannot secure settlement of the claim...” Ho hum. The pursuer is apoplectic with frustration, the defender a model of sneering indifference and those in the public galleries are getting impatient, having come here to have their own business disposed of in their favour (a matter of minutes, surely) rather than to watch some sort of will-he-won’t-he game show. Solicitors will know how difficult it can be to persuade one client to accept a compromise; how a settlement can be achieved between two unrepresented lay persons is a bit of a puzzle. I say unrepresented because where both sides have lawyers one may safely assume that exhaustive efforts at settlement will have been made already. “If the sheriff...” indeed. No wonder Emanuel Kant observed that out of
the crooked wood of humanity nothing straight was ever made.

**Interviewing children**

There are other signs that in some respects judges are having to abandon the role of the impartial umpire as it was set out most clearly by Lord Justice Clerk Thomson in the case of Thomson v Glasgow Corporation 1961 SLT 237: “Like referees at boxing contests they see that the rules are kept and count the points.”

In those days, even matters of equity or discretion had to be approached in a circumscribed way.

One early manifestation of this change was the practice of judges interviewing children in chambers to get their views about questions of custody and access as they then were called. This practice has been superseded effectively by the requirement in the Children Act about ascertaining the views of the child. In so far as there is a guarantee of confidentiality given to the child, this may result in a decision on the merits being made without parties being aware of the precise terms of the evidential basis for it. This does not seem to have caused an outcry.

**Criminal courts**

Moving to the criminal side of things, one egregious example of a change of approach (albeit one which did not need new legislation to bring it into being) is the Drugs Court now to be found in Glasgow, which has followed on and to an extent overlapped the Drugs Treatment and Testing Orders which were being piloted there and elsewhere. Both of these procedures have involved the sheriff having to adopt a role, which involves not only direct dialogue with the offender but also a strict supervision of the way the sentence is being performed. Continuing involvement of the sentencer is something new for us; the nearest before was I suppose the matter of dealing with breaches of probation or community service orders, which could on occasion be allowed to continue following a face to face confrontation in which the bench made a series of threats and promises to the defaulting and normally taciturn offender. The fines enquiry court too offered an opportunity for an exchange of views on future prospects. Otherwise it was the rule that once a sentence was passed the matter was out of the judge’s hands. Things are done differently elsewhere of course. In particular the French system involves the ongoing involvement, with powers of modification, of a judge (probably not the sentencer) until the sentence has been completed. In Scotland it has been the practice of certain sheriffs to require probationers to come in for an occasional chat to see how things were going. Although the precise legal import of such meetings is not clear; anecdotally at least they seem to have been enjoyed by all present. It does appear too that there would be many cases in which people who had successfully completed community-based disposals would not be averse to reappearing to receive a word of commendation from the sentencing judge.

**Judges as negotiators**

It may be thought that neither by temperament nor training are judges suitable people to become either negotiators or supervisors. There are difficulties too, so far as negotiation is concerned, of issues being prejudged which eventually have to come to proof. This may be especially true of courts trying to deal informally and on an ongoing basis with family matters such as contact. For example, it is common for one parent to make serious but in fact unfounded allegations about the conduct of another in a spirit of revenge in order to thwart contact. In order to make some sort of progress, contact may be under all sorts of conditions which are unnecessary but imposed with a view to moving the parties on to a situation where there can be even grudging agreement. It is difficult to see how this can be done without one or other (or both) parties feeling that decisions are being taken for reasons which do not reflect the true facts. There is much to be said for arbitration but perhaps judges should be kept for judging. In negotiation their position is that they are there not because of actual skills but because of their power to use the iron fist of compulsion if parties will not agree with the velvet-gloved indications of compromise.
Traditional judicial virtues

The French philosopher Denis Diderot described how men construct what he called a personal internal statue which has all the virtues to which they aspire. So to the traditional judicial virtues of private rectitude and public gravitas, the ability to take detailed notes of what a witness is saying (while simultaneously forming a view on credibility based on the look on his face) a reasonable familiarity with current thinking about the causes and consequences of youth crime, an effective way with the law of parent and child (nb Solomon did not have to make findings-in-fact about the divisible baby) and a belief that somewhere there may be a unified field theory of the law of contract in Scotland one now has to add the patience of a poker player and the negotiating skills of the man who talks the prisoners down off the roof at Saughton Prison. One would like to see the judicial appointments board wish list. Diderot goes on to say, incidentally, that much human unhappiness is caused by people’s failure to come up to the standards of their own ideal.

I do not wish to sound as though I am claiming that the judge’s lot is an unhappy one. To start with one is dry, warm and indoors. But if you look over the last thirty years then it becomes clear that the range of work in the sheriff court has increased enormously. It is a tribute, I suppose, to the versatility of sheriffs that when something new has come up it has often ended up in their court. But what is sometimes overlooked is that it is also a tribute to the skill and versatility of the solicitors who appear in that court, since it is no secret that it is much easier to decide a well-argued case than an ill-prepared one. As long as the adversarial process was the rule it did not matter very much what the subject matter was. So fatal accident inquiries without juries, appeals from children’s hearings, place of safety order applications and all the rest, all were fine. But of course the adversarial system has its critics, especially in terms of inequality of resources between civil and criminal matters. Accordingly, if for good and sufficient reasons we are beginning to depart from it in certain areas, there might be something to be said for looking somewhere other than the already busy sheriff court, particularly if the necessary skills of the person in charge are not necessarily those of the impartial judge.

Of course the reason for preferring the court is the perceived necessity of compulsion in the event of unsuccessful negotiation. “But was it for this that I studied Stair and Grotius?” I hear the sheriff say, faced with a claim for £100 for the hire of a minibus answered by a counter-claim that it broke down and the travellers arrived at the function too late to enjoy the pre-paid high teas. Well it might be, as these sort of cases notoriously throw up points of law about agency, implied terms of contract and the actio de minimis even if the judge is the only person to realise (and ignore) this. However, if the first duty of the sheriff is to try to settle the action then there might be something to be said for looking at an approach along the lines of that set out at the beginning of this piece. Applications for the post of para-sheriffs should be sent to the usual address.

More pilots ahead?

I hope I am not being unfair if I say that I am not entirely sure that matters are going to end. One hears whispers of domestic violence courts and of youth courts. It seems that pilot schemes (dread words) are the way we live now, based perhaps on the interesting if fallacious idea that a judge should have technical expertise rather than just an ability to understand evidence (there is an interesting argument about this, vis-à-vis coroners’ courts in “Middlemarch” but the idea really turns there on the suspicion that some medical witnesses would talk such rubbish that it would need a medically qualified judge to realise this). It is difficult to see why pilots are thought necessary; either something is a good idea or it is not and one should not forget that while the experiment is just that, the subjects of it, those caught up in the Public Defender pilot for example, are real.

About twenty-five years ago a plan to create what were known as mini-sheriff fell by the wayside with a change of government. It may be time to look at the proposal again, with a view to letting negotiatory and supervisory work, along with most interlocutory work, being done by someone other than the judge, who will then be freed for solemn (or at least serious) criminal work and civil proofs of substance. There is too much delay in the disposal of important business and inappropriate use of shrieval time cannot be anything but a contributory factor.
A new tide of educational philosophy is sweeping through the universities and into the education and training of future solicitors, as the traditional methods of teaching, assessment and training have all been found wanting in the face of the complex requirements of the 21st century. This new philosophy challenges the values of traditional, lecture based teaching, rote learning by students and assessment by unseen, written examinations. Now, for many practitioners, the prospect of a debate as to the merits and demerits of didactic teaching and rote learning and such like is perhaps as about as attractive as a Vogon poetry recital but we should, however, be wary that a lack of vigilant interest in the topic may cost us dearly. This new philosophy acknowledges that its practical implementation will be significantly more expensive, at all stages of education and training, than our present arrangements and it looks in all directions for funding and has even set down a marker for an annual educational levy to be collected as part of the costs of a practising certificate. Such a levy may seem unthinkable but there seems at present to be no serious challenge to the merits of the new approach and, once those merits have been accepted for implementation, the money shall have to be found from somewhere. As the practicalities and costs of these new methods of instruction are now upon us, the time is perhaps right for the wider profession to consider the wisdom of this proposed departure from established and long standing methods and entry into a new and more expensive arena of education and training. Of course, there may be some members of the profession who would point to the recent drive into a brave, new competitive world of legal practice and question the logic of subsidising the provision of a new breed of twenty first century solicitors with the very skills that will enable them all the better to compete with their generous donors and perhaps deprive them of their livings, but most of us would probably be willing to consider contributing either directly or indirectly to the funding of a more elaborate training system if that were shown clearly to be in the public interest and in the interests of the future standards of the profession. This new approach is widely accepted, claims to be necessitated by
social change, bears to be approved and even compelled by government and presents itself as based on sound, guiding principles. It is the purpose of this writer; however, to widen the debate by considering the opposing propositions, namely, that the entire departure is based upon a series of fallacies, that it is likely to decrease rather than increase the value of the education and training process and that it is thoroughly against the interests of students, trainees, the profession and of the public and that, insofar as the proponents of this new approach seek access to additional funds, both public and private, for the exercise, those financial aspirations should be considered as relevant to the debate. On the assumption that most readers will have a reasonable recollection of the process of education and training that brought them into the profession, I would like to set out, in summary, what I understand to be the guiding principles of this new philosophy and to consider their merits.

EXPANSION OF LEGAL KNOWLEDGE

In the first place, the expansion in volume and complexity of modern law, now at the hands of two separate legislatures, with a third parliament in waiting, including the implementation of human rights, Scottish devolution and the adoption of European law is said to make totally impracticable the traditional educational goals of learning in the law degree the key provisions of all significant areas of the law in Scotland. These developments create a need for lawyers instead to be able to think imaginatively and analytically, to present well reasoned argument and to understand the broader context in which Scots law now falls to be developed so that, instead of attempting to carry the law in their memories, lawyers shall carry instead the ability to access relevant law and to apply it to the situations brought to them by their clients. In short, there is too much substantive law for this to be learned and students must instead acquire the skills of finding and presenting the law as required in particular situations.

It may be false, however, to argue that an increase of legal knowledge necessitates a departure from learning that information in favour of acquiring the skills of finding that knowledge and applying it to problems situations. That argument addresses legal knowledge as an amorphous body of rules and regulations, designed to meet specific situations and while this may be a reasonable description of much modern statute law, it ignores the principle based, scientific approach to law which holds that legal theory contains fundamental principles from which detailed rules can be deduced by logical reasoning. Simple volume of detailed regulation is insufficient grounds for the conclusion that legal science has grown beyond the range of undergraduate study and, before any drastic departures are undertaken, some demonstration is required that the body of law now depends upon more principles than may be studied in the course of the law degree. It was probably never the case that every legal rule and regulation was touched upon in the law degree and, if the increase in legal principles and regulation necessitates a reduction in the amount of detail with which the law degree should clothe these principles, then so be it, but that would certainly be a better option than the wholesale replacement of the teaching of legal knowledge with the inculcation of skills which should more properly be delivered at a later stage in the education and training of solicitors. Rather than concede to the influx of legal regulation, in view of the contents of some modern legislation, the academic may be best placed to examine that regulation for meaninglessness, contradiction, unintelligibility, political inspiration and a general tendency to legislate on the hoof without regard to existing principles and practice.

REPLACEMENT OF DIDACTIC TEACHING WITH PROBLEM BASED LEARNING

Because traditional didactic, lecture based teaching promotes passive learning rather than the active involvement of students in the learning process, it is said to promote a superficial coverage of material which the student notes down and seeks to memorise, rather than to understand, and little or no insight is gained as to the purpose or meaning of that material. Where the teaching/learning process is addressed to realistic, relevant problems situations, the student is immediately stimulated to become actively involved and to develop analytical thinking and powers of problem-solving and imagination, all as required by the real-life practitioner. Research is quoted to show that problem based learning, more so than the traditional, didactic lecture/student situation, capitalises upon the student’s initial enthusiasm in selecting a particular degree course of study, develops the skills of problem-solving abilities upon which future clients will depend, creates independent working habits and self-management skills and an ability to adapt to changing situations and provides experience in team working and interdisciplinary co-operation. In short, prospective solicitors should acquire the skills required to be solicitors rather than the irrelevant skill of memorisation without comprehension.

However, the argument that didactic teaching encourages rote learning contains a fallacy within the fallacy, namely, that rote learning is a bad thing. The contrary is true. Rote learning is a good thing, an essential thing, a powerful learning tool, and intellectual achievement which calls for understanding, concentration and accuracy. It is a purely intellectual exercise, achieved within the mind of the student. Outwith legal study it is often used to make abstract theory available for the solution of immediate practical problems as the child learns the times tables in order to achieve otherwise impossible mental calculations and as we all use thirty days hath September for the management of time. Its absence would leave Shakespeare silent and rote learning is now being studied as an antidote to Alzheimer’s disease and as an aid to mental health in general. It is, however, when we consider its place within the realm of legal study that the principle fallacy is uncovered, because rote learning
forms little or no part of legal study. Certainly, law students memorise essential information, as the soldier learns the parts of his gun and the doctor the parts of the body, but none of this is rote learning in the sense of committing sequences of words to memory by heart. This writer comes in contact with many relatively recent graduates in law and has frequently inquired as to extent that rote learning formed part of their method of study. Almost none has acknowledged having used rote learning to any great extent but some have owned up to the use of its mnemonics to assist recall of particular topics and some have referred to colleagues who have learned case names off by heart. This writer’s own recollection of undergraduate study includes only very little use of rote learning and, given the importance of the envisaged evil of rote learning in support of the new method of instruction, the absence of the substantial use of rote learning in the law degree would be correspondingly important in the demonstration of the insupportability of the new method. In short, rote learning is a good thing but is relatively rare in undergraduate legal study and is not a significant product of didactic teaching.

Further, the proposition that the traditional lecture delivery promotes superficial coverage, alternatively, that problem based learning fosters deep learning and understanding, also contains a hidden fallacy, namely, that superficial coverage is a bad thing. It is not a bad thing. It is a good thing and an essential thing without which the study of law is meaningless. To take the assertion literally for one moment, let us consider the inquiry which seeks to ascertain the geological nature at, say, 100 metres below sea level. Before going deep, the enquirer must go superficial. If he started his bore at the top of a hill it would seem unnecessarily laborious and if he started at the top of a 100 storey high rise block of dwelling houses, it would seem to be insane. Reason dictates that he should first consult the superficial picture and then decide where to bore more deeply. In the practice of law it is even more obvious that there is no merit in seeking to understand how the deepest and most complex circumstances of human conduct and society are treated in law unless and until the enquirer has some understanding and perspective of the law as a body of rational principles, susceptible to human understanding, several, or even many, of which are likely to interact with each other in application to the situation under inquiry. Again, however, the major fallacy lies in the statement that didactic teaching promotes superficial coverage at the implied expense of understanding. While it may not always happen, there is unarguably enormous potential for abstract, intellectual achievement when mind meets mind in the lecture theatre, at the tutorial or in the study of learned texts and the contrary assertion is hardly fair to those diligent and capable lecturers that devote themselves to the preparation and delivery of excellent material, describing both superficial characteristics and the detailed significance of legal principles. A bad lecture may be bad, but a good lecture is not only a good way to deliver the knowledge and understanding of law, it is perhaps the best way in which the accumulated wisdom of legal thought can be properly transferred to future practitioners, given that textbooks cannot measure progress by eye to eye contact, relax tension at an appropriate stage or answer questions posed by listeners. In short, didactic teaching does provide useful, superficial coverage but is capable also of pursuing deeper knowledge and understanding. Taking the alternative assertion, that problem based learning fosters deep learning, this is a discovery that is racing through higher education and many institutions have undertaken to deliver courses in the problem based learning mode rather than by didactic teaching. The lecturer ceases to be a teaching expert but becomes a learning facilitator who releases the students’ energy and learning potential and addresses the realities of professional practice instead of the artificiality of the teaching classroom. Other interesting educational revolutions include the departure from traditional reading and writing lessons in primary schools under the ITAT revolution some 20 or more years ago, the merger of all levels of ability in the one classroom and, more recently, the approval of school pupils selecting the hours of attendance and subjects of study. The problem with educational revolutions is that tragic mistakes are not immediately apparent. If, say, lorry-drivers or tight rope walkers were to adopt significant changes in method, then any defect in theoretical reasoning would probably become immediately apparent, possibly with catastrophic results. Not so in education, and one has to consider how many unfortunate persons were robbed of the full enjoyment of their lives.
by those theorists who argued that it would benefit them not to be taught traditional and transferable reading and writing. It certainly seems to be a fallacy that law students would benefit by being taught less of the substantive law.

The Quality Assurance Agency

Another important argument in the new philosophy concerns the quality assurance agency, a Government agency which has, to put it somewhat shortly, made it a condition of university funding that degree providers, including law degree providers, demonstrate that undergraduates are given, as well as knowledge, an ability to solve problems and to conduct research along with transferable skills of analysis, synthesis, critical judgment and evaluation, together also with abilities of communication and literacy so that, as well as absorbing information, the undergraduate shall acquire the skills required for proper efficacy in the workplace. Allied to, and possibly as a result of, this development, there has been a widespread undertaking throughout higher education to reduce the use of a didactic or traditional lecture based teaching and to place more emphasis upon the provision of transferable skills and abilities as referred to above. This change may be far from fully implemented but there appears to be no challenge to the proposed benefit of that implementation. In short, the Government says it has to be done and everyone else is now doing it.

It is probably not necessary to expose the obvious fallacy here but some brief comment might be helpful to those who have had things to do other than to follow events surrounding the development of the Quality Assurance Agency, whose title alone should be sufficient to fix its place in relation to any intelligent debate. The QAA is an organisation which was created somewhere within government/civil service circles to exercise a UK wide jurisdiction in the field of higher education at just about the same time, coincidentally, that Scottish devolution was becoming a reality. This writer, for one, has formed the view that that the QAA is an entirely political economic organisation that has little to do with academic standards or the methods of higher education. At previous stages, there was some doubt as to whether or not the institutions of higher education would even allow the QAA to set foot in the universities for the purposes of inspection and whether the universities would accept the so-called benchmarks standards issued by the QAA. If one is interested in promoting useful education and training for future solicitors, there is nothing whatsoever to be gained by spending time contemplating the QAA, its benchmark standards or the extent to which these are adopted in institutions of higher education, or anywhere else. One might even choose to find it sinister where the state is seen to encourage or even to compel a departure from the traditional teaching of law, given that the state is the most frequent adversary of the citizen in court. For completeness, it is a fallacy that major changes should take place in the method of delivery of legal education and training on the grounds that the QAA says so.

Continuous assessment of students’ coursework instead of unseen written examination

The traditional unseen written examination is said to encourage rote learning or uncomprehending memorisation of material, regurgitation in an artificial examination situation and short term retention of information, all without a full understanding of the relevance of that material to professional practice. Passing the examination, instead of achieving professional capability, becomes the object of the exercise and, when the examination has been passed, the purpose of the study has been served and the information may be discarded. Where, on the other hand, progress depends upon the exercise of skills of research, analysis, synthesis, reasoning, drafting and presentation, preparation for open book examination or the writing of an essay in the student’s own time, the maintenance of a log book or the conduct of a case based project with peer group members, the students are assessed on the very skills and abilities which are required for practice. Irrelevant memorisation for short term isolated written tests is replaced with study and assessment which mimics the needs of professional practice and establishes a continuum of relevance from the commencement of the law degree right through to the process of lifelong learning and continual professional development which is the lot of the professional solicitor in the 21st century. In short, the prospective solicitor should be assessed on his ability to be a solicitor rather than an ability to memorise information for short term examination purposes only.

However, this argument contains an assumption that students abort the knowledge which they have previously accumulated for examination purposes, whereas, another interpretation is perhaps at least equally valid, namely, that, having studied for the unseen examination, the student achieves a peak of readiness for that particular objective, in much the same way as the practitioner prepares for proof or trial, after which the specific details retreat from the forefront of consciousness but remain permanently and indelibly imprinted in the recesses of the mind. It is perhaps appropriate that the student lawyer undertakes that exercise in circumstances in which there are no clients’ interests at stake. The experience of the learning and of the examination having happened, nothing in educational theory can change that position or erase the notes that were constructed during the learning
The training of educationally qualified persons for entry into the solicitors’ profession is carried out mainly by practising solicitors under appropriate regulation by the Law Society and is not subject to organisation, delivery or control by any other persons or bodies.

The solicitors’ profession does not subsidise any part of the academic education of prospective solicitors.

This solicitor and trainee contract is subject to appropriate regulation and recommendation by the Law Society as to the nature and quality of training and as to the level of remuneration and other conditions but stands alone economically and no part of it is the subject of subsidy by non-training members of the profession.

Finally, it has to be acknowledged that there are problems which have to be addressed and, indeed, in addition to those already identified we have the challenge of maintaining existing standards of education and training achievement in the face of wider access, other problems emanating from at least the state sector of secondary education and a general moving away from the previous values on which much of our legal principle has been developed. All of these challenges exist and the legal implications have to be addressed and not dodged as the new philosophy envisages. Firstly, education should be tested by external and objective examination and the present régime of recognition of educational attainment verified by teachers who are interested in positive findings in that verification should be identified for the questionable currency which it utters. Secondly, a clear distinction ought to be maintained between education on the one hand and training on the other because the present confusion of the two falls between two stools and damages the provision of both. The Law Society, alone of the institutions in the frame, is able to fashion and deliver these objectives and might consider doing so instead of following this latest outbreak of educational jargon.

(The above article has been extracted from the author’s web page - home.btclick.com/msheridan/lecture.htm - on which any readers who are interested may find a fuller version)

notes:
1 Time to re-invent the law degree - article - Journal, March 2002
2 Scottish Legal Education in the Twenty First Century 6.3
3 For example, by Professor Patterson as reported in the minutes of the AGM 2001
4 Chapter I of Scottish Legal System by Professor Walker and as discussed at Stair IV 1.1.17
5 Reported in the Sunday Times 7th April 2002
6 For a discussion, see http://www.unifon.org/ita-comments.html
7 Reported in the Sunday Times, not 1st April, but 24th March 2002.
8 See http://www.hertfordshire-genealogy.co.uk/data/chrisinfo/lucyreyneons.com
The best laid plans

For Henderson Boyd Jackson solicitor Alistair Duff

a climbing expedition to Alaska turned into something of a busman’s holiday

On Sunday 2 June 2002 at 2.15am I stepped off the plane in daylight in Anchorage, Alaska, about to take part in my sixth climbing trip of the last 15 years.
The five previous visits have been to the Himalayas but none with as small a group as the four of us. We had grants from the British Mountaineering Council and the Mount Everest Foundation to attempt various first ascents of peaks on the Donjek Glacier in the Yukon (Canada).

Two of our party had departed a week earlier than I to hopefully set up base camp, but as it transpired, by the time we arrived they were on the Eclipse Glacier at about 10,000 feet, some three miles west of the Donjek, bad weather having forced the glacier pilot to land them there.

We were meant to play catch-up with them, but having reached our US glacier pilot’s wilderness lodge, which was 100 miles from the nearest roadhead, on the Tuesday, the first thing on Wednesday morning he told us the weather was too bad over Mount Logan and he would review hourly.

Shortly afterwards he dropped the bombshell and said he couldn’t in fact fly into Canada, having received an e-mail from the Royal Canadian Mounted Police and the Civil Aviation Authorities closing his Canadian operation down. He assured us he had been flying into Canada for 20 years without problem and had the requisite permits and licences. He stated he would be consulting his lawyers and congressmen as climbers lives were being put at risk and perhaps we could help by contacting the
British media as certainly at that stage, apart from our friends, there was a British climber on Mount Logan. I immediately thought about an action for breach of contract and possibly punitive damages as our climbing holiday was being totally disrupted.

Our two friends were thus stuck on the Eclipse Glacier without apparent means of flying out and we were despatched to rescue them. We were lent a truck and drove the 500 miles to Kluanie Lake in the Yukon and arrived at a small airstrip on the Friday night next to the North American Arctic Institute. (We were only 90 miles as the crow flies across the ice cap from our wilderness lodge).

Our friends apparently were on the Eclipse with American scientists who were drilling ice cores and, in return for heavy labour, they would be flown out!

We spent four days waiting for the weather to break in the company of the Canadian Glacier pilots who in effect had caused our pilot to be banned. We heard their version of events and saw various documents and were pigs in the middle of a trade dispute which had been precipitated by our pilot taking delivery of a new twin otter plane worth $1.2m in April which gave him a definite competitive edge.

Their position was our pilot had no requisite licence to fly into Canada and had, over the years, misled customs authorities who had let him fly in and out of Canada but there were now ongoing criminal and civil actions against him.

I was asked about the UK law regarding the seizing of planes and trucks as they stated their law was weak and they couldn’t seize our borrowed $35,000 truck resplendent in our glacier pilot’s company logo (Ultima Thule).

On the Sunday, one of my friends was helicoptered out during a window in the weather and thereafter the last member was taken out by plane on the Tuesday and we immediately drove back to the USA. I was asked about potential court action against our pilot on the grounds of breach of contract as we had, in essence, each paid $1,000 to be delivered and picked up from a specific glacier.

Two peaks are now named Mount Macbeth and Haggis Peak and, apart from the usual dangers such as avalanches, crevasses etc, our hairiest moment was a visit from a grizzly bear who had obviously lost his bearings!

On our return to our wilderness lodge, we decided to take no further action. On talking to an American lawyer/climber who had come off Mt St Elias I learnt that there was no punitive damages for breach of contract.

The stranding of climbers in these mountains, the Wrangle/St Elias Range which straddle the US/Canadian border, raises serious issues. We met three climbers at the lodge who had come off Mount Logan, the highest mountain in Canada and were made to ski an extra six miles to the arbitrary border in the middle of the glacier so our US pilot could pick them up.

One of our glacier pilot’s friends was seriously injured in Canada and whilst he could have rescued him immediately, the Canadians could not and there was a delay of 48 hours which, fortunately, did not prove fatal.

During our three-week stay, to my knowledge, three climbers in these ranges were killed due to avalanches, crevasses, the fickle weather and the like.

The weather coming off the gulf of Alaska is some of the worst in the world, but we had enjoyed our climbing and, as per the name of our glacier pilot’s company, “Ultima Thule”, we have visited “land remote beyond reckoning”.

I was asked about potential court action against our pilot on the grounds of breach of contract.
Communication can curb complaints

Convener of the Society’s Client Relations Committee Alan Davies tells Roger Mackenzie of the latest initiatives for handling the vexed issue of client complaints.

The annual report of the Scottish Legal Services Ombudsman, and The Law Society of Scotland’s response to it, always has a distinct air of déjà vu, but this year the Justice 1 Committee’s inquiry into the future regulation of the legal profession adds a hitherto absent feeling that this time things really are about to change.

In fact, the Society’s client relations team are attempting to anticipate areas ripe for change by implementing a series of reforms designed to reduce the time taken to resolve disputes.

New convener of the client relations committee, Perth solicitor Alan Davies, is charged with guiding a process of reform and reiterating the message to the profession that there are positive steps they can take to prevent complaints reaching the stage where they arrive on the desk of the client relations office.

“The profession shouldn’t be afraid of complaints. The idea of course is to avoid them if possible, but realistically the pace of modern life and the number of solicitors and clients involved means that complaints will be forthcoming”, said Alan Davies.
Accepting that a certain level of complaints is inevitable, the issue is then how to deal with them. Clearly it is preferable if the complaint can be dealt with at the firm’s level, before it reaches the Law Society.

“Sometimes a degree of pragmatism will be necessary and to recognise that legitimate complaints do exist.”

Still at the root of most complaints is a lack of communication from solicitor to client and a failure to provide basic information to clients. To some extent that has been addressed by use of terms of business letters, and Davies says anecdotal evidence suggests this is a good method of avoiding typical complaints such as people getting bills that they regard as unexpectedly high or which lack sufficient detail.

“If complaints are dealt with promptly and politely with a recognition that there may be some ground to it, it can often be resolved.

“The kind of thing that often mushrooms is often as simple as the client getting the bill and being surprised at the amount. They might be perfectly content with the service they have received but they simply didn’t expect that kind of bill.

“Most complaints can be dealt with if you don’t bury your head in the sand and the very worst thing you can do is ignore the complaint or any subsequent correspondence from the Society.

“Often it can be a case of failing to keep the client advised of the ongoing progress of the transaction. The solicitor might well be beavering away in the background, yet fails to communicate to the client what’s happening and what difficulties are perhaps impeding further progress of their case. Equally in every court case there are winners and losers and the losers are inevitably unhappy with the outcome and may blame their solicitor.”

There has to be recognition that there are some difficult clients who will complain about any service – and indeed a small minority who are malicious. The so-called “Watchdog” effect may at least partly account for the 49% increase in the number of complaints made against solicitors as reported by the Ombudsman, part of a trend that saw complaints against lawyers over all increase by 57%.

“We are living in a more consumerist age where clients and customers generally demand quicker, more efficient and cheaper services, not only from the legal profession but all service providers.

“There are vexatious complaints and we all know clients who will never be happy. One of the most important roles of the modern solicitor is managing client expectations. If a client knows what to expect and you tell them, the likelihood of a complaint is lessened”, said Alan Davies.

The Client Relations Office continues to promote the use of client relations partners, someone who will deal with all complaints to the firm in a positive way. Issues of course remain as to how sole practitioners deal with complaints and Alan Davies suggests there may be merit in exploring setting up ad hoc arrangements with other sole practitioners if that is practicable.

Yet once a complaint does reach the CRO, one of the chief criticisms made by the Ombudsman was the “complexity of the investigation process”. “That in itself can give an impression of bias – of being more in tune with the lawyer than ordinary person”.

Ombudsman Linda Costelloe Baker went on to criticise the length of time taken to investigate complaints and remarked “in the welter of correspondence, the issues that matter most to a complainant can be overlooked”.

“Any subsequent correspondence, the issues that matter most to a complainant can be resolved.

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A pilot project designed to address these criticisms will begin soon whereby once the complaint has reached the Society, the Client Relations Officer will become actively involved in attempts to conciliate. The aim is to resolve many disputes before they go as far as the client relations committee.

“With some complaints correspondence bats back and forward and the Society accepts that the process often takes too long and we acknowledge the criticism of the Ombudsman in that respect.

“If a complaint is dealt with speedily there is a greater prospect that the complainant will be satisfied with the outcome”, said Davies.

It might be suggested that the use of a legally qualified conciliator does nothing to resolve the problem of perceived bias and the possibility that the conciliation process will be conducted in impenetrable legalese from the complainant’s perspective. Is there a case for greater use of lay conciliators?

“We don’t want the complaints to become too technical or legalistic, but someone with a legal training is useful. We are looking at greater lay involvement, and it helps if the process isn’t dealt with solely by lawyers. Even in technical disputes a lay perspective can be helpful in getting to the essence of the complaint.”

However, while Davies recognises that the length of time taken to deal with complaints is often unacceptable, some of that can be put down to the absence of any delegated decision making power which means all decisions have to be made by the entire Council of the Society. It’s hoped that delegated powers will be introduced next year facilitating a leaner and quicker process.

In the meantime, the continuing programme of roadshows promoting the use of client relations partners, but also offering more general advice on dealing with complaints, will be available across the country.

Even in technical disputes a lay perspective can be helpful
As any fule know, in the words of Nigel Molesworth, the maximum sentence for breach of the peace is three months imprisonment. This is one of the reasons that a Police (Scotland) Act charge (max nine months) will sometimes mutate on the morning of a busy trials court into our old chum, the two-cop breach. Except that it is not. In terms of sec 5(3) (b) of the Criminal Procedure (Scotland) Act 1995 it is provided that notwithstanding the general limit of summary imprisonment of three months, up to six months is competent where a person is convicted of “a second or subsequent offence inferring personal violence.” This came up for consideration in the case of Paterson v Webster 2002 GW 23-745 where concurrent sentences of six months had been imposed. The appeal court held that this was inapplicable, since the offences in question as charged did not infer personal violence. This was in spite of averments in the complaint of brandishing knives and threatening the lieges with violence, it being held that there was no averment of any particular person being menaced with the only breach likely to attract the higher tariff is one which is virtually charged as an assault. Further, it should be noted that what is important is what is said in the charge rather than what may come out in the evidence or the prosecutor’s narration. Still on the mechanics of sentencing, Lynn v Howdell 2002 GW 21-714 contains a warning about courts making a period of unpaid work for the community a condition of a probation order. A period of six months probation with a condition of 80 hours work was appealed successfully on the basis that in terms of sec 229 of the 1995 Act 12 months is allowed for completion of community work and that if the period of probation was only six months no order beyond that period could be made. In practice this seems to mean that any probation order with a work condition will have to be for at least 12 months, even although Lord Marnoch reserved his position as to whether or not the provision in sec 229(5) that the 12 month period was subject to “any necessary modifications” was habele to shorten the period to coincide with the probationary period. One has to conclude that this is another good reason for reverting to the original general practice of keeping probation and community service quite separate. Next, McPherson v Spiers 2002 GW 17-565 clears up something about which doubt has been expressed before. This arises out of the Crown’s practice, for reasons of fairness, of charging driving while disqualified on a separate complaint to, say, theft of a motor vehicle committed on the same day. Did this entitle the court to pass separate sentences exceeding in cumulo the six months which would otherwise be the limit? No, said the Appeal Court, the charges fell to be treated as though they were on a single complaint. Finally Rennie v O’Donnell 2002 G WD 20-697 raises an interesting point about the sheriff court’s ability to deal in a regionally-specific way with particular offences. The one in question here was of driving while disqualified and a three months sentence of imprisonment had been imposed, the court holding that there were no mitigating circumstances and that the view in that particular jurisdiction (Ayr) was that the way to make sure that driving bans were heeded was to impose sentences of imprisonment if they were not. In allowing the appeal, the court held that there could be no policy decision in any sherifdom with regard to such offences and that every case had to be treated on its merits. Effectively this means that where there is a perception by the bench that a particular crime is especially common, no warning can be given that is likely to be dealt with severely in the hope of thereby reducing offending through deterence. Further, one recollects the difficulties caused some years ago in a two-sheriff court where one took the view that drivers a good bit over the limit should be dealt with by an increase in the period of disqualification while the other preferred a much larger fine. Presumably for them to have put their heads together would have involved the formulation of an impermissible policy. It should be noted, however, that this does not preclude the High Court giving a general indication about the sort of sentences that are appropriate in certain classes of case. This was done, for example, in relation to the downloading of obscene images of children and to take another instance, more or less at random, one finds in Catherine Findlay v PE Edinburgh(unreported) Lord Cameron of Lochbroom saying “…using a motor car as a weapon to injure someone is undoubtedly very serious and of a kind which merits a custodial sentence in the ordinary course.”

Criminal evidence

Turning to criminal evidence Pupkis v Thomson 2002 GW 17-554 reaffirms the law about the evidential value of a witness’s prior statement which is not adopted by that witness in his testimony. While such a statement is available as a check on credibility it cannot
be used as substantive evidence by way of the hearsay evidence of the officer who took that statement. The idea of adopting a statement which one cannot remember making (one says) is an interesting one: whether the usual formula adopted by prosecutors is worth much (You would not lie to the police would you? – No – So what you told the officer at the time must be true? – Don't know) remains in doubt. So far as the question of fresh evidence to be founded on in an appeal against conviction is concerned, Binnie v HMA 2002 GWD 22-725 clears up some questions about the form in which this should be. A witness subsequently was claimed to have said that his evidence at the trial was false and to have given a statement to that effect but to have refused to sign an affidavit. It was held that a precognition, being the precognoscer's account of what a person was said to have said, was insufficient for the purposes of sec 106 of the 1995 Act. It was observed that while good practice might prefer a sworn statement there were other forms which might be acceptable, such as a video recording of a televised interview or a book written by the witness.

**Entrapment**

The nature and consequences of entrapment were considered by the appeal court in Brown v HMA 2002 GWD 18-593. Essentially, entrapment occurs when someone is pressured by the state into committing a crime which would not otherwise have been committed. Lords Philip and Clarke in particular distinguished between oppression and entrapment. In the former case it was necessary for there to be such a degree of prejudice that it could not be removed by a direction from the presiding judge. In the latter, there was an abuse of process so fundamental that there was no need to investigate the question of prejudice. All of the judges referred with approval to what was said in the English case R v Loosely [2001] WLR2060. The position would seem to be that oppression is a plea in bar of trial and as such should be raised and proved by the defence. Unfortunately the case is not as clear a guide as it might have been had the defence raised the question of entrapment properly, the way the matter was put before the appeal court being that by the time the evidence was completed it should have been apparent that this might have been a case of police entrapment and that question should have been left to the jury, a submission which was not successful.

**Conduct of a defence**

The conduct of a defence, and whether or not it constituted a good ground of appeal, came up again in Winter v HMA 2002 GWD 19-621 where it was successful in respect of two of the charges on which the appellant had been convicted. It was held that the appellant's counsel had failed to put forward a defence which had been instructed in a way that went beyond a reasonable judgment about tactics. It is probable that anyone involved in defence work will wish to read the case carefully!

**Search warrants**

The question of search warrants was considered in a case reported under the name of Advocate's (Lord) reference O1 of 2002 at 2002 GWD 24-763. The sheriff had held that a search pursuant to a warrant was irregular in as much as the police had with them and helping them a civilian employee, who, the defence argued, was not authorised to search, with the result that evidence resulting from the search was not admissible. The case in question involved the alleged possession of indecent photographs of children and the civilian in question was a member of the computer forensic unit there to assist the head of the unit. The first question posed by the reference was whether the sheriff erred in upholding the defence objection and this was answered in the affirmative. The third question sought guidance as to the extent to which persons who were not police officers might participate in a search under warrant without detriment to the admissibility of evidence recovered. The court, under reference to Hepburn v Brown 1998 JC63 confirmed that other people could assist police officers where a warrant authorised a search and that the level of assistance which could be provided depended on the circumstances of each case. Here the person referred to was judged to be merely acting under the directions of the head of the unit. Accordingly the law would appear to be that provided the principal actors in the search are police officers, subsidiary assistance is quite in order.
To think that in 1986 the Insolvency Act was intended to constitute an overhaul of insolvency proceedings in the United Kingdom which would see a substantial framework remaining unaltered for many years! To the plethora of amending legislation which has succeeded is now added EU Council Regulation number 1346/2000 on insolvency proceedings which actually or potentially affects every type of insolvency proceeding in the UK and came into force throughout the European Union (Denmark excepted) on 31 May 2002.

The Regulation applies to relevant proceedings opened on or after 31 May. The time of the opening of proceedings is defined as the time at which the judgment opening proceedings becomes effective whether it is a final judgment or not. In the case of Court based procedures therefore it will be important that issues pertaining to the applicability of the Regulation are addressed at hearings after that date even in respect of petitions which may have been presented before that date.

The purpose of the Regulation is to improve the efficiency and effectiveness of insolvency proceedings with a cross border dimension by either simplifying or removing formalities previously associated with recognition and enforcement of foreign insolvency proceedings. It is not an attempt to harmonise the insolvency laws of individual member states.

Like all EU Regulations the Regulation is directly applicable and becomes an integral part of each member state’s law. The Regulation will prevail in the event of any incompatibility with national law. However, to ensure full workability and enforceability in the United Kingdom a number of amendments will be required to both primary and secondary insolvency legislation.

The Regulation applies only where a debtor has his centre of main interests within the EU and deals only with jurisdiction within the EU. It does not apply to insurance undertakings, credit institutions or certain investment undertakings. For the purposes of the Regulation the United Kingdom represents one jurisdiction and the relevant proceedings which are covered by the Regulation are winding up by or subject to the supervision of the Court; creditors voluntary winding up (with confirmation by the Court), administration, voluntary arrangements, bankruptcy and sequestration. Creditors voluntary windings up will not enjoy the benefits of automatic recognition and enforcement without formal confirmation by the Court and new procedures require to be put in place for this purpose.

The Regulation does not apply to any form of receivership nor does it apply to members voluntary windings up or to windings up made solely on just and equitable grounds, as the insolvency of the debtor is a prerequisite for recognition.

The Regulation introduces two types of proceedings. These are “main proceedings” which can be opened only in the member state where the debtor has his “centre of main interests”. Essentially this will be the place where he conducts administration of his business on a regular basis and therefore ascertainable by third parties. The (rebuttable) presumption in the case of a company will be that this is determined by the location of the registered office. These proceedings are (subject to territorial proceedings) to have universal effect throughout the EU.

“Territorial proceedings” can be opened in any member states in which the debtor has an establishment - effectively a place of operations where he carries out non-transitory business. The effect of territorial proceedings is restricted to assets situated in that member state. Where territorial proceedings are opened after main proceedings they are termed “secondary proceedings” and can only be winding up proceedings. They cannot be rescue or rehabilitation proceedings. There may therefore be some incentive to ensure, say, a territorial administrator is appointed before main proceedings which will not promote a rescue are commenced by someone somewhere else.

These changes will restrict the wide jurisdiction which UK Courts have previously asserted, for example on the basis of preservation of assets. The scope to request the opening of territorial proceedings before main proceedings have been opened is limited to creditors established in that state or whose claim arises directly from the operation of the establishment in that state or to situations in which main proceedings cannot be
The reach of the insolvency office holder in territorial proceedings is restricted to those assets situated in the member state where the proceedings were opened irrespective of whether or not main proceedings have been opened in relation to the debtor.

The general rule is that the national law of the state in which the proceedings are opened is the applicable law. This law therefore determines the opening, conduct and closure of the proceedings. The Regulation contains a non-exhaustive list of the matters to be determined by the law of the proceedings and contains a number of substantive conflict of laws provisions which apply in a number of areas, for example protecting existing proprietary interests in assets situated in another state, and applying the law governing an employment contract to the effects of the insolvency on that contract. Challenges to preferences and other antecedent transactions under the law of the proceedings also appear to be limited by the law governing the transaction which is being challenged.

The Regulation makes major advances in the areas of international recognition of insolvency proceedings and the exercise abroad of an office-holder’s powers. Proceedings opened under the Regulation will be recognised without formality in all member states and main proceedings will be immediately effective in all member states as long as no territorial proceedings have been opened there. Subject to the same condition an office-holder appointed in main proceedings will be able immediately to exercise his powers in other member states.

The Regulation also provides a structure for the interaction of multiple insolvency proceedings in relation to the same debtor for the purpose of improving the efficiency and effectiveness of proceedings which have cross border effect. This affords primacy to main proceedings which will serve as proof of the debtor’s insolvency for the purposes of secondary proceedings. To achieve this the Regulation imposes a duty on office holders to co-operate with and communicate information to each other; it also gives the office-holder in main proceedings a range of powers in relation to secondary proceedings. It should, however, be noted that less co-operation is required between territorial proceedings commenced before main proceedings elsewhere and those main proceedings.

The Regulation’s provisions in relation to information for creditors and approving of claims are generally straightforward but there are novel aspects to them. These include the power for office-holders in both main and secondary proceedings to prove the claims which have been proved in proceedings for which they were appointed in other insolvency proceedings. The Regulation also removes the previous exclusion of foreign tax claims in insolvency proceedings.

The DTI has already identified a number of provisions in the Insolvency Act 1986 which will require amendment and that a number of definitional provisions will require to be introduced and the rule making powers of the Act extended to enable rules to be made to give effect to the Regulation. A range of amendments to the Insolvency Rules 1986 and the Insolvency (Scotland) Rules 1986 will also be needed and a number of statutory forms relating primarily to opening insolvency proceedings will require to be modified and a number of new forms introduced.

Taken with the changes to insolvency proposed in the Enterprise Bill currently before Parliament, practitioners and advisers in this area of law will need to commit significant time to familiarisation with the flow of legislation (both primary and secondary) together with associated forms and procedures over the coming months.

Alistair Burrow is a partner of Tods Murray

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The Government berates our profession over litigation cost and delay, whilst overlooking a fast and efficient solution it has already seen, but isn’t using. Paul Motion reports.

Let’s blame the law and lawyers
Health Secretary Alan Milburn said on 24th April 2002: “I think most people acknowledge our clinical negligence system isn’t working well. It is expensive, it is unfair; it takes far too long to settle these claims, and as far as small claims are concerned all too often we end up paying out more money to lawyers than we do to patients. Now that can’t be right, so I’ve asked the Chief Medical Officer, Sir Liam Donaldson, to now bring forward proposals for a fairer system to settle these sorts of clinical negligence claims”.

Hang On…..

Q What do the following have in common? Anderson Strathern, Balfour & Manson, Digby Brown, Drummond Miller, HBM Sayers, Ledingham Chalmers, MacRoberts, Thompsons, Henderson Boyd Jackson, Paul Gebal and Co, Lawford Kidd, Corries, The Anderson Partnership, Quantum Claims, Royal and Sun Alliance Glasgow, AIG Glasgow, Direct Line Glasgow, and….the Scottish Health Service Central Legal Office?

A Eight of them paid to set up Scotland’s “Intersettle” on-line claims negotiation website. And all those named are registered as “Users”. Some use the site rather more than others.

On-line Negotiation sites – Who are the players?
In March 2000 an article appeared in this Journal detailing two of the first on-line negotiation systems which had begun to operate in America. Where other “dotcoms” have crashed and burned, both Cybersettle (www.cybersettle.com) and Clicknsettle (www.clicknsettle.com) remain a success story.
In the United Kingdom there are three on-line negotiation providers. In England, Anne Irving, a personal injury and litigation specialist, set up WeCanSettle (www.wecansettle.com). Another site, E-settle (www.esettle.co.uk), was set up by Judicium, which describes itself as an umbrella company specialising in the application of IT and the Internet to the legal services industry. In Scotland a unique approach has been followed. Stephen Moore, backed by eight of Scotland’s leading litigation practices, set up Intersettle (www.intersettle.co.uk) in November 2002. This website has been developed and paid for by Scots lawyers. It incorporates many distinctively Scottish legal features.

**On-line Negotiation: Objectives**

The objective of on-line negotiation is to provide better service to claimants and compensators by speeding up the settlement process. This involves changing the medium from hard copy correspondence, faxes, or telephone, to the Internet. Users can eliminate a number of the drawbacks traditionally associated with the negotiation process such as mail delays, voice mail, posturing, ill discipline and reactive valuations.

**On-line Negotiation: How it works**

**– Blind Bidding**

First, users submit basic details of their claim via the website, and also place an opening offer of settlement. Unlike traditional negotiation or Tenders, the amount of a bid can be kept “Blind”, that is, secret from the other party. So a bidder preserves his position if the case doesn’t settle. Websites such as Intersettle also have an optional Open Bid format.

Assuming both parties really do want to try and settle the case, they can agree factors such as how long the negotiation period will run for, how close the parties have to get for a deal to be done, and by what percentage each bid must improve over the previous one, to ensure that real progress is made.

The opposing party then places a counter-offer. This, again, can be a hidden amount. This process continues, with each bid increasing or decreasing by a fixed percentage until the pursuer’s demand and the defender’s offer come within an agreed range of each other. Then, the software that works the website automatically declares the claim settled at the mid-point.

These systems presuppose, not surprisingly, that on each side of the dispute there are lawyers or claims handlers with a sufficient degree of experience and maturity to conduct the negotiation process in good faith, with a realistic expectation of the monetary region in which a claim ought to settle. The system encourages the users to go in near this level at an early stage in order to generate a quick settlement. There is no limit to the number of bids that can be made but clearly the idea is to make quick progress.

**What are the benefits?**

- Claims demonstrably settle more quickly
- No letters, faxes or phone calls
- Communication is direct to the opposing agent’s PC.
- Postal delays are eliminated.
- Parties have clear notice of when the negotiation period will end.
- In-house administration costs are cut.

**On-line Negotiation – Current American Position**

Cybersettle’s website claims are impressive.

1. Cybersettle has helped its clients settle over $80,000,000 in claims.
2. Over 475 insurance companies use Cybersettle either directly or through their third party administrators.
3. There are in excess of 60,000 users currently on the Cybersettle system.

**On-line Negotiation – Current English Position**

Online settlement has been enthusiastically embraced in England where WeCanSettle.com says it has settled hundreds of personal injury cases via the Internet. Anne Irving, managing director, says: “We know that new technologies often tend to follow a pattern of early hype, followed by a more progressive take-up as the initial obstacles to changing working practices are overcome. Whilst there is a long way to go before the potential of online settlement is universally recognised, those firms who are both truly client focused and innovative have been quicker to perceive the benefits to all parties.

“A cost-benefit analysis of one of our earliest pilot projects involving hundreds of cases between a major insurer and large law firm found that using WeCanSettle reduced the negotiation phase from 70 days to 12, reducing internal costs for both parties and accelerating payment of damages and costs.”

**On-line Negotiation – Current Scottish Position**

Intersettle has been demonstrated to very large numbers of lawyers, judges, conference delegates in Paris and the UK, the Scottish Executive, the Health Service CLO, and Employment Tribunal chairmen. It has also aroused interest from Law Accountants - after all, how much time and
Online Negotiation - Changing the Norms

Using online negotiation tools requires certain shifts in the litigation lawyer's culture and business norms. This has proved a much more intractable area as Stephen and the executives of Intersettle, E-settle and WeCanSettle have all discovered.

“While these systems require virtually no investment in technology and only minimal training, they do rely upon solicitors, far more than insurers, being prepared to change the way in which they have always worked. They have to value claims much earlier and become more proactive in initiating settlement negotiations,” says Moore. “Some of what I consider to be the better and more dynamic firms embrace this and are always looking for ways to better their service provision. The solicitors involved value their cases early and this means that the client knows where he or she stands early. However, this is perhaps earlier than a lot of solicitors would like to do it. One solicitor stated to me that he felt like Chris Tarrant when he received an offer from the insurer: I imagined him holding the offer letter out like a cheque to his client asking him if he wanted to go for more. This amazed me and gave me an idea of what I would have to overcome”

Online Negotiation – What Scottish Users Say

The Anderson Partnership found success almost immediately with online negotiation. Alan Taylor, a partner in the Anderson Partnership’s Glasgow office, was the very first solicitor to settle a Scottish claim this way.

“I settled a number of cases using Intersettle and I found the system to be intuitive and effective,” says Alan. “I do think that the legal system in Scotland, particularly reparation practitioners, need to make more use of technology to provide better services to their clients and this is a good example of the progress which can and will be made.”

Patrick McGuire, of Thompsons in Glasgow, who exclusively represents the interests of pursuers, echoes Alan’s sentiments:

“Online negotiation, in my experience, is an extremely useful tool. The parameters can be clearly defined and contact is almost instantaneous. You do not encounter secretaries, voice mail, or administrative error. Personally I have settled a number of cases in a very short time frame and I have no doubts that in the future, when other firms and insurers catch up, I will settle a lot more.”

David Bell, who is Claims Technician for Royal and Sun Alliance in Glasgow, hints that solicitors may require to be more assertive and forward thinking in their use of technology:

“I used Intersettle on a number of occasions and I found the system very easy to use. It was also effective. I have been disappointed that solicitors have not appeared to show a great deal of initiative by initiating cases against us and this has got in the way of us using it further.”

Stephen Moore is more forthright:

“We have indeed found that the solicitors are by and large slower to initiate the cases than the insurers. The result of this is that insurers then begin to hold back. It would be easy to characterise this as complacency but I think the better view is that fear of change, ingrained work practices, and lack of client pressure are perpetuating the old habits. However, I am aware of one major insurer that has conducted a very favourable cost benefit analysis into on-line negotiation in England. I have no doubt that many claims will be settled this way in time”.

Scotland - The Future

It says much for the vision of Scotland’s lawyers that they were prepared to devote time and resources to establishing a state-of-the-art claims negotiation tool. Intersettle continues to provide its successful online negotiation service and will, from the end of August 2002, be offering all registered users an e-mail service summarising relevant Scottish court decisions direct from the Scottish Courts website (www.scotcourts.gov.uk). The challenge now is to make the profession comfortable with this new way of working, in the interests of everyone. Sir Liam is watching you.

Paul Motion writes here as a non-executive director of Intersettle. Anyone interested in trial use of the website should contact registration@intersettle.co.uk

e: paul.motion@ledinghamchalmers.com
Each month, Derek O’Carroll, Advocate, reviews a selection of the best websites in particular areas of law. This month, the subject is intellectual property law.

Readers who have any comments on this column, suggestions for sites to be reviewed or legal areas to be covered should e-mail him at jlsswebreview@blueyonder.co.uk Five stars is the maximum rating.

**www.intellectual-property.gov.uk**
The Government gets in on the act with this packed site containing loads of information geared mostly to UK law. Great site for beginners (Question 1: “What is IP”) and non-lawyers, though there is plenty to interest lawyers too, especially the good set of links including trade mark resources, patent resources and copyright resources. There is also a very up-to-date news section. Without doubt, the best set of links to UK resources in IP anywhere on the net, although many of them are only tangentially related to IP. For specialist resources, one of the sites listed below may be better.

**Usefulness ***** Site design ***** Updating frequency *****

**www.kuesterlaw.com**
This American site is reputed to be the most comprehensive site on intellectual property law in relation to technology law on the Internet and seems to have gathered more stars from various awards than this column has available for a month. It contains a modest collection of American caselaw on IP issues especially in connection with information technology. There is a long list of links to those claiming to be “technology lawyers” including some in London, England; but none in Scotland, UK. The best part of the site is the lengthy list of links in the Resources section which are conveniently divided into patent, trademark and domain name, copyright and journals. The links are to a mixture of other sites, articles and case commentaries. You could do a lot worse than start at this section for your research on IP issues. This column is less generous than others with its valuable stars though…

**Usefulness ***** Site design ***** Updating frequency *****

**www.gtlaw.com.au**
The website of Gilbert and Tobin, a Sydney-based law firm, is a gem. These are people who really know how to give it away. And so tastefully as well. The core of the site is its publications section comprising loads of articles on IP and ICT issues: mostly legal, but some technological. Some are focused on Australian matters but are still of interest especially in Internet law which is most heavily influenced than other areas of law perhaps by international developments. There are maybe three or four per month and the archive goes back to 1996. Although not further categorised into subsections there is a search engine. The firm is hot on telecommunications issues as well with a similar bank of articles. Maybe all of this is to be expected from a firm that while specialising in various commercial issues also maintains a pro bono unit employing two lawyers full-time to work in the “community”: and that in a state with a well-developed legal aid system.

**Usefulness ***** Site design ***** Updating frequency *****

**www.derwent.com/intellectualproperty/index.html**
Derwent Information claims to be the world’s leading patent information provider. It supplies a huge range of services concerned with patents worldwide including patent searches, very up-to-date information on patent litigation (mainly US), defensive publication, user group networking areas, patent watch and patent delivery services. Mostly for a fee, naturally. There are various specialist databases which are also available through a number of its partners such as Westlaw and Axiom.

**Usefulness ***** Site design ***** Updating frequency *****

**www.icann.org**
The Internet Corporation for Assigned Names and Numbers (ICANN) co-ordinates the assignment of Internet domain names and Internet Protocol IP address numbers among other things. Its comprehensive site provides lots of information about how all this works. One section provides detailed information about how the domain name dispute policy works together with searchable databases on disputes resolved and those that are ongoing, a list of approved dispute resolution service providers and the rules. There is also up-to-date news on technical issues and developments.

**Usefulness ***** Site design ***** Updating frequency *****

**www.phillipsnizer.com/internetlib.htm**
This part of the site published by the eponymous American firm is their Internet Library. It is a trove of indexed and summarised court decisions of most aspects of IP as they link with the Internet. As the authors say “just the law ma’am, and nothing but the law”.

**Usefulness ***** Site design ***** Updating frequency *****
This month, Alistair Sim considers an area of risk which can have a dramatic impact on the efficiency, productivity and conduct of practitioners in any professional practice and may be a hidden cause of problems.

For the majority of solicitors, stress is part of everyday life – whether that arises in the course of preparation and conduct of a court case, closing a corporate transaction, dealing with executors and beneficiaries or settling an awkward conveyancing transaction on time. Coupled with demands of clients and deadlines are the pressures to make fee targets and, in the case of principals, to manage the business effectively.

A certain amount of pressure is no doubt healthy for most professionals but a variety of risks arise when this gets out of control and individuals begin to function in a permanently stressed state. Consider the following claim example:

**Example - The present**

Mr Whyterabet is now sole principal of Whyterabet & Carroll. He became significantly busier following the untimely death of Mr Carroll six months ago. The practice was heavily reliant on conveyancing business, although Mr Carroll had also undertaken some employment law work for several small companies. Whyterabet required to bring himself very rapidly up to speed on the Accounts Rules, since Mr Carroll had been the Designated Cashroom Partner.

As a response to the requirement to pay out Mr Carroll’s capital in the business, efforts were made to find alternative, less expensive premises.
Whyterabet saw fee income halve, despite his attempts to take on even more business. He realised that he could not afford to turn away any business and, in the evenings, attempted to catch up on the developments in employment law since 1971. He also wished to take on an assistant, but felt that he could not afford to take on someone experienced – however, neither had he any time to train someone new. With all of these problems on his mind, Whyterabet settled six transactions on Friday 13th June.

The future

Three years later the business is on the up and up, with two new partners and a larger office. Just when everything seems to be going particularly well, a problem comes to light concerning a remortgage security which was one of the transactions Whyterabet had completed on Friday 13th June. The bank discovered the defect in the security when attempting to sell the property following repossession. A claim is intimated to the Master Policy insurers.

The reason for the claim may have been inserting an incorrect description of the property secured, but was the underlying cause of that error connected with the background events in the six months preceding settlement? Whyterabet certainly found it difficult to understand how he could have made the mistake. He was always meticulous about the preparation and checking of securities. Could stress have been a factor?

Stress as underlying cause of problems!

Stress can have a dramatic impact on efficiency, productivity and conduct. Could stress therefore be the cause, or one of the causes, of some instances of otherwise unexplained behaviour which might explain certain complaints and claims resulting from, for example –

- Errors of judgment despite long experience
- Abruptness or rudeness to clients or to other solicitors
- Misleading clients
- Misappropriation of funds

Inability to focus on work – errors of judgment

If an individual is suffering from stress, they are exposed to a situation where their normal behavioural patterns are altered. Any such change increases the likelihood of an individual acting out of character. In a professional context, this may result in unexpected errors of judgment and this, sometimes in combination with unusual circumstances, can result in claims.

Inability to process tasks efficiently – reduced efficiency

All solicitors require to be able to prioritise a number of tasks during the course of every working day. It is part of their ‘job description’ to be able to balance competing demands on time. That ability may be compromised through overwork or lack of experience. If an individual is distracted during the course of the working day, inevitably their productivity will suffer which in turn can be a cause of unexplained delay and missed critical dates.

Absence

Some individuals may not be able to handle stressful situations as well as others. If they feel that they will not be afforded a sympathetic hearing and are unable to articulate their concerns to others, they may begin to show a higher level of absence than colleagues.

Breakdown

In the worst scenario, someone suffering from subjectively high levels of stress may feel unable to continue working. This may happen if warning signs, such as increased absences, higher levels of errors and reduced productivity, are ignored. An employee (or partner) on long-term absence is a problem for a practice. The work done by that individual will require to be redistributed, which may place a greater burden on colleagues. The practice loses the benefit of that individual’s skills and expertise. In some unfortunate cases, breakdowns have resulted in frauds and deceptions being committed.
Risk awareness and risk control

A stressful circumstance is one with which you cannot cope successfully (or believe you cannot cope) and which results in unwanted physical, mental or emotional reactions. Stress is your reaction to an inappropriate level of pressure.

There are a number of steps that can be taken to attempt to ensure that a high pressure work environment, such as a busy practice, does not become stressful to the point of causing ill health either to principals or staff.

Recognise the symptoms (in yourself and others):
- Poorly explained absences
- Sudden downturns in productivity
- Abnormal mood swings
- Physical symptoms e.g. excessive fatigue, headaches, stomach pains

As with all aspects of risk management, awareness of the risks is crucial. How aware are you of the risks? Are you able to recognise stress? Do you take appropriate action?

Assessing workloads
How well do you assess workloads, as opposed to simply measuring hours worked?

Analysing complaints, claims etc
Is a comprehensive record maintained and analysed of instances of complaints, claims, re-work and ‘near misses’ to identify problem areas, including (possible) stress?

Considering sickness/absence records
Does analysis of records reveal problems within a particular area of the practice?

Fear culture?
What is the culture of the practice or of the department or team in terms of attitude to honest mistakes or asking for help? Is everyone able, willing and encouraged to admit to mistakes or to needing help or are people afraid to own up and more inclined to cover the situation up?

Stress management
Taking action may include the following issues:
- Address culture issues
- Review individuals’ responsibilities
- Encourage a system of reporting difficulties
- Make sure regular performance reviews cover stress issues
- Take advantage of assistance such as LawCare, provided though the Society (see below)

Learning to cope with stress is not a substitute for identifying the underlying causes and dealing with them at source.

As with all areas of effective risk management, the benefits are likely to be realised in more than one aspect of the practice. As well as minimising the risks which could result in complaints or a negligence claim against the practice, improved job satisfaction and morale ought to result as well as improved business efficiency.

LawCare – Health Support and Advice for Lawyers

The following is an extract from LawCare’s website and literature:
“...As a service to Solicitors and Barristers The Law Society of England and Wales Charity Fund and the Bar Council have funded LawCare, an advisory service to help Solicitors and Barristers, their staff and their immediate families to deal with health problems and related emotional difficulties. The service was subsequently extended to Scotland by arrangement with their Law Society.

We offer the opportunity to discuss health issues and problems which are interfering with, or have the potential to interfere with, work performance and/or family life – and to seek help in resolving the problem in its early stages.

Help and support is accordingly available to those who are suffering stress or depression as a result of their work, family or financial problems, or who have an alcohol drug or other misuse or dependency problem. Ignoring problems and hoping they will go away is no solution. The first step is to recognise the existence of a problem, the second is to seek objective and non-judgmental expert advice. This is where LawCare comes in.

Our service:
- Is strictly confidential between all parties
- Takes the form of an initial telephone assessment, advice and/or referral where necessary
- Is available to all Solicitors and Barristers, their staff and immediate families
- Is provided as a free service, although any subsequent professional counselling or treatment will normally have to be paid for unless available on the National Health Service or covered by private health insurance”

LawCare contact details
We have three Freephone Helplines to help with your health problems. They are staffed from 9.00 a.m. to 7.30 p.m. each weekday and from 10.00 a.m. to 4.00 p.m. on Saturdays and Sundays.

Telephone 0800 279 6869 or e-mail help@lawcare.org.uk or help@LawCare.org.uk.

The information in this page is (a) intended to provide guidance on matters of practical risk management and not on issues of law (b) necessarily of a generalised nature and (c) not intended to endorse or recommend any particular product or service. It is not specific to any practice or to any individual and should not be relied on as stating the correct legal position. Alistair Sim is Associate Director, Professional and Financial Risk Division, Marsh UK Limited

e: Alistair.J.Sim@marsh.com
Bruce Ritchie, Director of Professional Practice at the Society, addresses issues of particular interest to conveyancers, including cash back deals and closing dates and notes of interest.

Closing Dates and Notes of Interest

The Committee first published a guideline on closing dates in 1991. This has been updated on a number of occasions, most recently in February 1999. The Guideline can be found in the Parliament House Book Volume 3 at page F980. In a particular transaction solicitors acted for a prospective purchaser. They noted interest with the estate agents selling the property and were advised that there was one other note of interest. No closing date had been fixed. The solicitors submitted an offer and received a verbal acceptance by the estate agents. The offer was passed to the seller’s solicitors but in the following week those solicitors advised that a better offer had been received from another party which the seller now wished to accept. The first solicitors complained that their client was distressed as “she thought that she had secured the property” although she had been advised that the contract was not binding until missives were concluded. The firm felt that the seller’s solicitors should have withdrawn from acting rather than accept their client’s instructions and sought a change to the Guideline to that effect. The Committee observed (a) that the solicitors and their client knew that there was another interest noted; (b) that the offer had been submitted to estate agents and there had been no prior communications with the seller’s solicitors; and (c) that no qualified acceptance had been issued.

The Committee therefore agreed that in the circumstances the sellers’ solicitors were not under any duty to withdraw from acting and declined to amend the Practice Guideline. The Guideline does not require solicitors to fix a closing date if more than one interest is noted. The Committee are of the view that noting an interest does not imply an undertaking that the prospective purchaser will be given an opportunity to offer. Such an undertaking would have to be expressed.

Cash Back Deals

Solicitors acting for a builder sought guidance on the question of “cash back” payments. The Committee agreed that unless the cash back position is disclosed to the purchaser’s lender there is a risk that the sellers may be involved in allegations of conspiracy to defraud the lender. The Committee therefore advised that the builder’s solicitors should seek evidence from the purchaser’s lender of their consent to the cash back deal. Without such evidence the sellers should therefore insist on the net price being inserted in the title deeds rather than the price before the cash back is deducted. In practice it is believed that most lenders are comfortable with the concept of a modest cash back deal on a new build property.

Settlement with Separate Agents acting for Lender

In a commercial security, the lenders were separately represented and their agents insisted on delivery of an executed and stamped disposition in favour of the purchaser before they would release the loan funds. Clearly the transaction could not be settled and a disposition obtained unless funds were made available. In the particular case the lenders were eventually satisfied with a faxed copy of the executed disposition. The Committee noted that the matter can be dealt with if the disposition is sent by the seller’s agents to the purchaser’s agents to be held as undelivered with authority to send it on to the lender’s agents also to be held as undelivered – although of course it would not be stamped at that stage. However, the Committee agreed that if the lender’s agents have such a requirement the borrower’s agents must be advised at the earliest opportunity as such a requirement is regarded as a departure from normal practice. Failure to make such a requirement known until the last minute could be regarded as misleading another solicitor.

Bruce Ritchie, Director of Professional Practice at the Society, addresses issues of particular interest to conveyancers, including cash back deals and closing dates and notes of interest.
THE Society is planning a trip to the European Parliament in Brussels from the 13th to the 16th November 2002. An interesting programme is being constructed which, it is hoped, will give the practitioner a greater insight into the working of the European Institution at a most crucial time in European law developments. The Justice and Home Affairs agenda of the European Union is gathering pace and for many practitioners European Union law will become an integral factor in the advice which they give their clients in the years to come. As was identified in the article Justice and Home Affairs which appeared in the June edition of the Journal (JLSS June 2002 Vol. 47 No. 6 Page 50), projects such as EU proposals for compensation of the victims of crime, a consultation paper on procedural safeguards for suspects and defendants in criminal proceedings, the European Public Prosecutor, the EU arrest warrant and the initiative on the enforcement of foreign fines will ensure that the criminal practitioner will have much to do with EU law very soon.

Indeed the proposal in relation to the EU arrest warrant is included in the draft Extradition Bill which is currently being consulted upon by the Home Office.

Consumer Protection

The Commission has recently published a Green Paper on Consumer Protection and Commercial Practices which can be accessed on the website at http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_pract_index_en.html). This proposal suggests the idea of adopting a Framework Directive on fair commercial practices and the development of a legal instrument for co-operation between enforcement authorities. The Commission is going to engage in detailed consultation with Member States and other interested parties to work on issues to be covered in such a Directive.

The Brussels Office

The Joint Brussels Office of the Law Societies of England & Wales, Scotland and Northern Ireland hosted a successful reception on 18th June in Brussels. The event marked six years of co-operation with the German, Austrian and French equivalents. MEPs, Commission officials and lawyers. David McIntosh, the President of the Law Society of England & Wales, welcomed MEPs and the Glasgow-based MEP on the role of Scotland in an EU context. Later in the evening there will be a visit to the Scottish Executive at Scotland House and a talk on the promotion of Scottish interests in Europe. In the afternoon, following lunch with invited guests from the Council of Ministers, there will be a visit to the European Commission with talks on the European Union and its Institutions and the role and work of the Commission’s legal service. On Friday there will be a visit to the Law Society’s Brussels Office and then it is hoped that a European Commission official will examine in depth recent developments in Justice and Home Affairs. Lastly, in the afternoon, following lunch, there would be a talk by a Scots solicitor practising in Brussels on the importance of using and developing EC law arguments to promote your clients’ interests.

It is hoped that this visit will prove to be a stimulating and interesting one and that practitioners will bring back to Scotland much of use which can be applied in their day to day practice.

Not only will the visit be informative but it will be an easy and enjoyable way of accumulating CPD hours.

If you want to be included in publicity mailings for the visit, please give your contact details to Michael P. Clancy, Director, Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh, EH3 7YR or by e-mail to carolnighingale@lawscot.org.uk

Civil practitioners also will require to engage more closely with European law. A proposal for a Community-wide legal aid scheme dealing with all types of civil cases, including civil and commercial matters, employment law and consumer protection law. There is a consultation on the use of Alternative Dispute Resolution and the principle of mutual recognition of judicial decisions in family law matters is the subject of a proposal. In addition, there was a recent proposal aimed at improving the protection of victims of motor vehicle accidents. It is clear that clients are going to be given more rights and responsibilities and that this will have a knock-on effect on the demands put on Scots lawyers.

The Society’s trip will last from Wednesday 13th November to Saturday 16th November. Departures will be available from either Glasgow or Edinburgh and on Thursday 14th November the meetings start in earnest. It is envisaged that there will be a visit to the European Parliament which will then be sitting in Plenary Session and a talk by a Scottish MEP on the role of Scotland in an EU context. Later in the morning there will be a visit to the Scottish Executive at Scotland House and a talk on the promotion of Scottish interests in Europe. In the afternoon, following lunch with invited guests from the Council of Ministers, there will be a visit to the European Commission with talks on the European Union and its Institutions and the role and work of the Commission’s legal service.

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International Accounting Standards

The IAS Regulation was proposed by the Commission in February 2001. It is an essential measure in the Financial Services Action Plan. The Regulation will require, from 2005 onwards, listed companies, including insurance companies and banks, to prepare their consolidated accounts in accordance with International Accounting Standards (IAS). It aims to reduce barriers to cross-border trading in securities by ensuring that company accounts throughout the EU are more reliable and transparent and that they can be more easily compared. It is hoped that this will increase market efficiency and improve competitiveness in the EU. It should reduce the cost of raising capital for companies.
Continuing his assault on unnecessary legalese, Ellis Simpson suggests how you might frame a client-friendly letter:

Here is a typical lawyer's letter to a client:

```
Dear Client

Your Property

I refer to the above. The Land and Charge Certificates have recently been issued from the Land Register. Accordingly I enclose herewith my firm's business account together with Cash Statement. The outstanding balance is that detailed in the Cash Statement and I await your settlement cheque.
```

Here, as well as some of the offending words and expressions mentioned in an earlier column, there are also technical terms, or jargon, that some clients will find daunting. Does the client know what 'Land Certificate', 'Charge Certificate' or the 'Land Register' means? And why use 'Cash Statement' when 'Statement' is shorter and better?

This is my rewrite:

```
Dear Client

Your Property

The office responsible for keeping property records is The Registers of Scotland. Every time people buy or sell property, the Registers process the documents and update their records. They have now finished the process for the property you bought and have sent me the Land Certificate and the Charge Certificate.

- The Land Certificate shows the property, the title conditions and your ownership.
- The Charge Certificate shows the mortgage to your lender.

I am sending you a copy of both documents for your information. I am sending the originals to your lender – as the lender insists – to keep safe.

I am also sending you an invoice and Statement. The invoice shows our charges as agreed. The Statement shows the money received and paid out for you. You will see there is a balance due by you and I would be grateful if you would send me your cheque.
```

The first point to make is that the rewritten letter is longer. I do not believe that plain language versions of documents must always be shorter. Sometimes you should take more words to explain. The test, surely, is not whether it is shorter but whether it’s clearer.

The second point is the use of bullets to highlight part of the letter. Good document layout can be just as important in putting across the right message. This is a topic I’ll return to in a future column.

The third point is that it is my rewrite. You may have a different way of explaining the jargon. (If you think you can do better, please send your own rewrite in. In this business, you never stop learning.)

There is no absolutely right answer. There’s just a question: does the client understand it? If he does, that’s as good as it gets.

More Reading:

The Complete Plain Words
ISBN 0-14-051199-7

A classic, thorough guide to everything you wanted to know about clear communication in writing. The book shows its historical civil service roots by using more advanced vocabulary than modern plain language purists would probably prefer. However, it is a solid primer and a useful reference book. It does a very good job of shattering several writing myths. It also shows how much the plain language movement could have achieved if this 50-year-old initiative had been better supported by politicians and lawyers. As at December 2001 it was available in paperback through Amazon for about £8.
I will be very happy to receive reviews of books which readers have enjoyed and feel would be of interest to the profession. I would also welcome suggestions on areas of the law which we should tackle.

The Governance of Scotland – a Saltire Guide (2nd edition)

Constitutional reform in all its varieties has created a need for up-to-date, accessible books to which practitioners can easily refer. Electoral systems and parliamentary procedure may once have been distant details of long forgotten constitutional law lectures, but there is now a real need for solicitors to be informed and alert. The Saltire Guide will help to fulfil that need. For those routinely involved either in or advising on the legislative processes that affect Scotland, the Saltire Guide is perhaps a little too basic, although it is very handy to have a wide range of information collected in one place.

For those who need a comprehensive reference to governance in Scotland at different levels, this is a useful volume.

The Guide covers the workings of the institutions at Holyrood, Westminster and European levels. The emphasis is on Scotland and the Scottish Parliament is considered in much greater detail than the European institutions. The European overview is helpful and those seeking a quick refresher course are likely to benefit. However, the real strength of the book is its coverage of the UK and Scottish dimensions. There are only limited references to local government in Scotland, although public authorities merit a chapter; and it might be that there is a place for some treatment of that often neglected tier of government in a guide of this sort. A chapter, for example, on the Scottish electoral system which gives no hint of the discussions current and future on the subject of proportional representation in local government is perhaps incomplete.

The Stationery Office has wisely opted for a looseleaf format. The high turnover of information will demand very regular updating. For example, membership lists of the committees of the Scottish Parliament, which are subject to change at short notice, are included, and an unexpected Cabinet resignation or reshuffle requires a swift response to maintain accuracy. It is good that the format makes that possible.

Much of the information in the book is readily available elsewhere, free of charge. This is true in particular of the section on Scotland: the Scottish Parliament website is an excellent resource and gives easy access to the Parliament’s Standing Orders and guidance on legislation, among other things. In at least this respect, the Scottish Parliament has lived up to the expectation of being open and accessible. The Saltire Guide provides essentially the same information, but condensed and collated and that has its value. These are early days and there is, as yet, little scope for real commentary. However, as patterns emerge and precedents begin to accumulate, no doubt the provision of factual information will be enhanced by analysis and critical comment. That is what really gives added value.

This is a helpful guide which brings together a wide range of information from a variety of different sources and having it available will certainly save time over combing through a range of materials. Through updating, it promises to develop further. It is clear and easy to use and will be of benefit to many.

Morag Ross
Evidence: Cases and materials

The lot of the Scottish evidence student has improved considerably over the last six years. Instead of having to contend with an array of increasingly dated texts, the student now has available an up to date textbook (the third edition of Field and Raitt’s Evidence), a casebook and revision guide and, for reference, a new edition of Walkers on Evidence. (The last of these, of course, will have to be for library reference only – its price tag will place it beyond the reach of most students even if they have not spent the £79.45 which would be required to purchase a complete set of the other three texts).

Much of the credit for this minor revolution is due to David Sheldon, the author of both the present casebook and also the LawBasics revision guide. The second edition of his casebook follows six years upon the first, and its basic structure remains unchanged from the first edition. Major new cases, ranging from Smith v Lees to Brown v Stott, have been added, whilst other extracts have been judiciously excised to make way for the new material. The notes which accompanied extracts in the first edition have frequently been extended to take account of new material. On the whole, the updating process has been skilfully exercised, and the new edition is likely to meet with as warm a reception as the first.

It is not, of course, a book solely for the student market, although that is its primary audience. Neither is its sole function to provide a handy reference source for primary material (although it fulfils that function admirably). The majority of the extracts are accompanied by helpful commentaries, which will be of use both to students and to other readers.

No review, of course, would be complete without some minor nitpicking. It is unfortunate that most of the references to Cross (now Cross and Tapper), Walker and Walker, and Field and Raitt have not been updated to reflect the fact that new editions of those texts have appeared in the last six years. Secondly, the extract from Cross and Tapper at the outset of the judicial knowledge chapter is rendered confusing by the removal of the headings found in the original text. Finally, in the first edition, the extract from Rhesa Shipping Co. SA was accompanied by an explanatory footnote from Mr Sheldon on the issue of a presumption being used to surmount a burden of proof. The use of footnotes has been avoided in this edition, however. That is of little moment, but it is perhaps unfortunate that Mr Sheldon’s observations have instead been incorporated into the middle of Lord Brandon of Oakbrook’s speech. No doubt it is to the author’s credit to observe that those unfamiliar with either the first edition or the case itself are unlikely to notice anything amiss.

James Chalmers
When law met hip-hop

Alistair Bonnington reports from an IBA conference on transnational criminals, where all was not quite as it seemed.

Miami. To those of us of a certain age, the name conjures up visions of a seedy, vice-ridden city. Even to the Americans, it is a foreign land. “The great thing about Miami”, they say, “is that it is so near to America”. That’s about as close as Americans get to being drool. Being so near to the Caribbean and Cuba, the city is a melting pot for numerous immigrants of a wide variety of racial origins. Prima facie then, just the place for a predominantly white, middle-aged, middle class group of lawyers to spend the American Memorial Day holiday weekend at the end of May.

We shut ourselves away from the sun and sand in large, air-conditioned rooms in the Fontainbleu Hotel on Miami Beach and seriously discussed “The Alleged Transnational Criminal”. This was about the fifth in this series of excellent, high-level IBA conferences. The subject itself was fascinating. I had no idea that just so much money was involved in illegal transnational activity. It is not only in the world of drugs that money requires to be laundered. It seems that Scottish banknotes are renowned world-wide for being regularly laundered. There is an entire industry within the worldwide legal community involved in tracking and recovering illicit funds. The implications of this work in combating the threat of international terrorism following September 11 are clearly enormous.

A “Training for the job of Trial Observer” session was run by Nicholas Cowderey QC, a prosecutor from New South Wales and Chair of the IBA Criminal Law Committee. His useful seminar, aimed at preparing lawyers to be Human Rights monitors in countries where all was not quite as it seemed.

But even American lawyers, serious as they are, could not manage to spend the entire Memorial holiday weekend shut away in a hotel conference room when Miami lay just outside the front door. We decided to treat ourselves to a few hours off. We asked the hotel concierge for advice. It has been explained that this man was so excessively camp that, even at the San Francisco Millennium Gay Convention, delegates had remarked of him “Wow, that guy’s a bit queer” - or so he told us with pride. I blame his over-the-top approach to life for where we wound up.

He sent us down to the main boulevard in Miami Beach - Collins Avenue - which is full of original Art Deco buildings and runs just one block back from the beautiful long stretch of sand which gives the city its name. “You will just love those bijou buildings,” he pouted. So a little cultured architecture appreciation it would be.

But by the time we got there, it was late afternoon and the boulevard was jam-packed with literally thousands of Latino, Hispanic and Afro-American kids around the 20-year-old mark who had spent their Memorial Day weekend rather more joyfully than ourselves attending a hip-hop music convention.

The purpose of their promenade along Collins Avenue at this stage was, even to untutored eyes, the most direct courtship ritual imagined. While groups of boys sat on walls at the side of the street, the girls walked sufficiently slowly to allow the boys to get a good look and to engage them in merry banter regarding, shall we say, “future prospects”.

Feeling aged, and quite superfluous to the matters in hand, our little group withdrew to the cool and safety of the Delano (“a stunning unspoilt Art Deco jewel”) Hotel, famous for its cocktails. We took our seats on the garden terrace looking out over the ocean and ordered drinks. By now, darkness had fallen and the moon was shining over the sea, on the beach and into the hotel grounds. Below our terrace down at beach level was the most enormous swimming pool, which in reality was only about six inches deep across its entire expanse. Right in the middle, at a wrought-iron table and chairs sat a beautiful young couple eating cherries from a wicker basket and drinking champagne. They appeared to be somehow floating on the little waves of the pool which were picked out by the rising moon.

Spectacular, beguiling and quite, quite false - it could not manage to spend the entire Memorial holiday weekend shut away in a hotel
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